83-134

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NESGLO, INC., NESTOR CRUZ in his own behalf and on behalf of the Conjugal Partnership constituted with GLORIA DIAZ DE CRUZ, GLORIA DIAZ DE CRUZ,

Petitioners,

v.

THE CHASE MANHATTAN BANK, N.A., STANLEY ZYCH and ENRIQUE FERNANDEZ,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether the doctrine of res judicata or statutory provision of 28 U.S.C. 1738 applies to render a federal case moot when a state court judgment was entered by the state court without having subject matter jurisdiction over causes of action arising under the antitrust banking law, 12 U.S.C. 1975, which actions also have the nature of a "citizens suit" under 12 U.S.C. 1978.

2, Whether the doctrine of res judicata or statutory provision of 28 U.S.C. 1738 should apply to render a federal case moot when some of the parties at a parallel state court proceeding were different and were not privies of the parties at the pending federal case, specially petitioner Nesglo, Inc. which had elected to pursue its exclusive federal claims, under 12 U.S.C. 1975 in a Federal District Court and which was not afforded a fair opportunity to litigate its claims at the state court.

3. Whether Appeal No. 83-1166 was properly filed and not subjected to dismissal by the Honorable United States Circuit Court of Appeals when appeal was taken under Appellate Rule 4(a-4) due to the District Court's new determinations of facts which went beyond the jurisdictional grant given by the Circuit Court in its September 14, 1981 order the circumscribed trial court proceedings only to the topic of mootness.

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IN THE

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OPINION BELOW

The Petitioners, Nesglo, Inc., Néstor Cruz in his own behalf and on behalf of the Conjugal Partnership he has constituted with Gloria Díaz de Cruz and Gloria Díaz de Cruz in her own behalf, respectfully pray that a writ of certiorari issue to review the orders of the United States

Court of Appeals for the First Circuit entered in these proceedings on March 4, 1983, on Appeal No. 81-1097 and on April 28, 1983, Appeal No. 83-1166, affirming the Federal District Court Findings of Fact, Conclusions of Law and Memorandum Opinion dated February 8, 1983, pursuant to which the District Court issued a judgment on June 20, 1983. The orders of the Court of Appeals appear in the Appendix hereto. The District Court below entered two opinions, the first one which was subsequently vacated, appears published at 506 F. Supp. 254 (1980) and the second not yet reported, is attached in the Appendix hereto.

JURISDICTION

The orders of the United States Court of Appeals for the First Circuit were entered on March 4, 1983 and April 20, 1983. The March 4, 1983 Memorandum and Order stated that it was revoking the first opinion entered by the District Court on February 8, 1980. This first order directed the District Court to substitute the opinion reported at 506 F. Supp. 254 for a new "Findings of Facts, Conclusion of Law and Memorandum Opinion" dated February 8, 1983, in lieu of the said Opinion and Order of December 2, 1980 and as a consequence a judgment of dismissal on the grounds of mootness was to be entered. On March 2, 1983 a motion for clarification of order was filed, App. p. 56a and on the same month there was also filed a motion for reconsideration. App. p. 61a. The motion for reconsideration was considered and denied by the Court of Appeals on April 28, 1983. As an integral part of the First Circuit Memorandum and Order, the District Court then entered a new Judgment on June 20, 1983. This Petition for Certiorari has been filed within 90 days of that date. The April 28, 1983 Circuit Order dismissed

Appeal No. 83-1166. This Petition for Certiorari has been filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 12:

Section 1975: Civil Actions by persons injured; jurisdiction and venue; amount of recovery

> Any person who is injured in his business or property by reason of anything forbidden in section 1972 of this title may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without regard to the amount in controversy, and shall be entitled to recover three times the amount of the damages sustained by him and the cost of the suit, including a reasonable attorney's fee.

United States Code, Title 12:

Section 1978: Actions under other Federal or State laws unaffected; regulations or orders barred as defense

> Nothing contained in this chapter shall be construed as affecting in any manner the right of the United States or any other party to bring an action under any other law of the United States or of any State, including any right which may exist in addition to specific statutory authority, challenging the legality of any act or practice which may be pro-

scribed by this chapter. No regulation or order issued by the Board under this chapter shall in any manner constitute a defense to such action.

United States Code, Title 15:

Section 15: Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

United States Code, Title 28:

Section 1738: State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the

court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Puerto Rico's Law, Title 31:

Section 3343: Destruction of presumptions; res judicata

Presumptions established by law may be destroyed by proof to the contrary, except in the cases in which it is expressly prohibited.

Only a judgment obtained in a suit for revision shall be effective against the presumption of the truth of the res ajudicata.

In order that the presumption of the res adjudicata may be valid in another suit, it is necessary that, between the case decided by the sentence and that in which the same is invoked, there be the most perfect identity between the things, causes, and persons of the litigants, and their capacity as such.

In questions relating to the civil status of persons, and in those regarding the validity of nullity of testamentary provisions, the presumption of the res adjudicata shall be valid against third persons, even if they should not have litigated.

> It is understood that there is identity of persons whenever the litigants of the second suit are legal representatives of those who litigated in the preceding suit, or when they are jointly bound with them or by the relations established by the indivisibility of prestations among those having a right to demand them, or the obligation to satisfy the same.

Rules of Appellate Procedure, Rule 4(a)(4):

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment, or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

STATEMENT OF THE CASE

This case involves the jurisdictional power of state and federal courts to entertain antitrust treble actions in the banking field. It also deals with an unresolved point of law by this Honorable Court: Whether the doctrine of *res judicata* applies when a state court of the Commonwealth of Puerto Rico did not have jurisdiction over the subject matter to adjudicate actions under 12 U.S.C. 1975.

Respondent, The Chase Manhattan Bank, N.A., filed suit in Puerto Rico Superior Court against petitioners Nesglo, Inc., Néstor Cruz and Gloria Díaz de Cruz, under a factor's lien contract. Respondent Chase Manhattan had contracted specifically with the corporation Nesglo, Inc. which was sued as principal debtor. Néstor and Gloria Díaz de Cruz were sued and served as simple guarantors in the contractual agreement. The conjugal partnership which is a separate entity under Puerto Rican law, was not included as defendant in the state court complaint. Such conjugal partnership is the sole shareholder of Nesglo, Inc. Néstor Cruz and Gloria Cruz answered the state complaint denying the allegations and rising affirmative defenses. Petitioner Nesglo, Inc. did not file an answer or a counterclaim, since it filed a petition in bankruptcy the same day the answer was filed. Néstor Cruz, Gloria Díaz de Cruz and the conjugal partnership filed a permissive counterclaim in the state court proceeding, alleging among other claims, one under 12 U.S.C. 1975. The three involuntary defendants at the state court proceedings decided to file a complaint in the exclusive jurisdiction of District of Puerto Rico while the suit by the Bank was at the beginning of such proceeding.

The federal suit had different parties and causes of actions than the state law suit. Specific and detailed sworn

facts were alleged in the federal complaint which demonstrated more than ten illegal tying arrangements and monopolistic violations under 12 U.S.C. 1972. Treble damages were requested under the Bank Holding Company Act 12 U.S.C. 1975. Statute 12 U.S.C. 1975 is identical to a Sherman Act treble action, 15 U.S.C. 15 which lies under the exclusive jurisdiction of the Federal District Court. *Freeman* v. *Bee Machine,* 63 S. Ct. 1146, 319 U.S. 488. A 12 U.S.C. 1975 treble action also lies under the exclusive jurisdiction of Federal District Courts and the Plaintiffs-Petitioners herein were in the belief that they could secure federal relief. As to different parties, petitioner Nesglo, Inc. was not a party claimant at the state court suit. The petitioner conjugal partnership was not a party defendant at the state case and although it filed a counterclaim the Superior Court Judgment did not dismiss its claims. New defendants, respondents Stanley Zych and Enrique Fernández, officers of Chase Manhattan Bank were included in the federal case and were not parties in the state case. As to different causes of actions all the actions filed by petitioner Nesglo, Inc. in the federal case were new since said Petitioner never litigated any claims in the Superior Court of Puerto Rico. As pertains to Néstor and Gloria Cruz they were included in the federal case new causes of actions that they had not raised in the counterclaim at the Superior Court such as a 42 U.S.C. 1983 action, as well as actions on illegal search and seizure under the 4th Amendment and the equal protection clauses of the United States Constitution. All causes of action raised by Néstor and Gloria Cruz in the federal case against Stanley Zych and Enrique Fernández were never litigated in the Superior Court proceeding since both bank officers were never allowed to become parties in the Superior Court suit.

On April 22, 1980, while the state suit and the federal case were being actively litigated, the District Court, thru the Honorable Judge Ted Dalton ordered the herein petitioners to entertain discovery in the state case and to file an *appropriate answer* in the state case in which Nesglo could include a counterclaim. Petitioner Nesglo Inc. who had not filed an answer or counterclaim at that time in the State Court, relied on the authority of Judge Ted Dalton and attempted to file an answer and counterclaim in the state court on May 12, 1980. The Superior Court prohibited Nesglo, Inc. to file any such answer and counterclaim.

While the complaint of Chase in the Superior Court was still pending, on December 3, 1980 the District Court ordered dismissal of the federal complaint on the totally erroneous grounds of lack of jurisdiction. 506 F. Supp. 254 (1980).[1]

Petitioners immediately instituted appeal no. 81-1097 in the Circuit Court. Respondents used such erroneous determination to influence a favoral decision in the Superior Court case. While said appeal no. 81-1097 was pending, on May 1981, the Superior Court granted an unheard of sanctioning order in which it dismissed the answer and counterclaim of Néstor and Gloria Cruz and stated that the allegations of Nesglo were eliminated and judgment was entered accordingly. No pronouncement was made as to the conjugal partnership constituted between Néstor and Gloria Cruz which is the sole stockholder of Petitioner Nesglo, Inc. No evidence was heard, no fact determinations on the merits were made to enter the sanctioning

[1]Later on the United States Court of Appeals for the First Circuit ordered that totally erroneous published decision to be "substituted". See Appendix, pp. 59a-60a.

order. The sanctioning order was based because some lateness in the filing of answers to an immense set of interrogatories that repeated and duplicated what had been answered thru depositions. The Superior Court judgment was affirmed by the Supreme Court of Puerto Rico.

The United States Court of Appeals for the First Circuit heard oral argument on appeal no. 81-1097. After that hearing, the Circuit Court while retaining jurisdiction remanded the case to the District Court to expeditiously decide on the issue of mootness and to report findings of fact and conclusions of law to the Circuit Court.[2] The trial court thus decided to go *sua sponte* beyond the jurisdictional grant given by the Circuit Court and ordered the parties instead to discuss and file memoranda under other topics such as *res judicata* and collateral estoppel. The trial Court, in a letter to United States Court of Appeals Clerk, Dana H. Gallup, dated November 23, 1982, admitted that said court had gone beyond the jurisdictional grant when it stated: "Another reason for the delay is that *in addition* to the mootness issue mentioned in the Court of Appeals' Order of September 14, 1981, we ordered the parties to brief the related issues of res judicata and collateral estoppel." App. p. 14a. It is on these grounds that later it goes on to enter findings of fact and conclusions of law.

The herein petitioners filed extensive and detailed memoranda with applicable jurisprudence. The District Court on February 14, 1983 entered its Findings of Fact, Conclusions of Law and Memorandum Opinion in which

[2]This special order was issued on September 14, 1981 and notwithstanding the plain directive that the trial court should decide expeditiously the issue of mootness, the trial court took more than 14 months to make its new findings and then made such findings without respondents presenting any evidence whatsoever on "mootness".

it failed to discuss the arguments submitted by petitioners and completely evaded any discussion on the exclusive jurisdictional grant under the Bank Holding Company Act, 12 U.S.C. 1975. App. p. 17a-54a which was the gist of the case in the federal court. The herein petitioners immediately filed notice of appeal which was numbered 83-1166 to obtain review of such new and additional findings of fact and conclusions of law where the respondents had not even presented any evidence on the only issue which had been ordered by the Court of Appeals. Appeal 83-1166 was based on Appellate Rule 4(a-4).

On March 4, 1983 in appeal 81-1097 the Circuit Court decided that the trial court's prior judgment dated December 2, 1980, was erroneous and while it affirmed the new District Court Findings of Facts, Conclusions of Law and Memorandum Opinion of February 8, 1983 which had been made without any evidence being presented, it ordered the District Court to enter a judgment of dismissal on the grounds of mootness and not on the *additional grounds* which had been determined by the District Court. No costs were imposed to Petitioners. App. 59a-60a.

The herein petitioners filed a motion for clarification of order on March 2, 1983. App. p. 65 and a motion for reconsideration on the same month of March 1983, App. p. 61a.

On April 28, 1983 the Circuit Court then went on to dismiss appeal number 83-1166 on the ground of lack of jurisdiction. App. p. 68. However, appeal number 83-1166 was based on Appellate Rule 4(1-4). On April 28, 1983 petitioner's motion for reconsideration on appeal no. 81-1097 was then considered and denied by the Circuit Court. App. p. 69a.

On June 20, 1983, the Federal District Court entered a new "substitute" judgment on the grounds of mootness. App. p. 70a to deny the federal exclusive causes of action of petitioners.

REASONS FOR GRANTING THE WRIT

1. The decision below grants "concurrent" jurisdiction to federal and state courts to entertain and decide exclusive federal antitrust treble damages actions under 12 U.S.C. 1975 which decision is openly contrary to this Court's ruling in *Freeman* v. *Bee Machine,* 63 S. Ct. 1146, 319 U.S. 488, to other Circuit Court and district decisions and to Supreme Court decisions interpreting "citizen suits."

The district court below held that state courts have "concurrent" jurisdiction with federal district courts to entertain and decide exclusive jurisdiction treble damage actions based on the Bank Holding Company Act, 12 U.S.C. 1975. Sherman Act statute 15 U.S.C. is identical to 12 U.S.C. 1975. Both statutes confer treble damage actions and both serve the purpose of deterring monopolistic practices. In *Freeman* v. *Bee Machine,* 63 S. Ct. 1146, 319 U.S. 488 this United States Supreme Court ruled that 15 U.S.C. 15 actions lie under the *exclusive jurisdiction* in federal courts. Similar holdings have been followed by Circuit Courts in *Cream Top Creamery* v. *Dean Milk Company,* 303 F.2d 358 (1967), *Lyons* v. *Westinghouse,* 222 F.2d 184 (2nd Cir.) cert. den. 350 U.S. 825, 76 S. Ct. 52, 100 L. Ed. 737 (1955); *Kurek* v. *Pleasure Driveway,* 583 F.2d 378 (1978) U.S. cert. den. 99 S. Ct. 873, 439 U.S. 1090. Although no case law has interpreted the jurisdictional extension of 12 U.S.C. 1975, the statute is identical to Sherman Act 15 U.S.C. 15. When Congress approved

12 U.S.C. 1975, this Honorable Supreme Court had already decided the case of *Freeman Bee Machine*, supra, and several circuit courts had made interpretations of that statute, all those cases concluding that 15 U.S.C. 15 granted *exclusive jurisdiction* to federal district courts. Then Congress framed 12 U.S.C. 1975 to give it the same jurisdictional extension of 15 U.S.C. 15. Congress employed almost identical language. Thus the only reasonable conclusion that can be reached is that 12 U.S.C. 1975 of the Bank Holding Company Act confers *exclusive federal jurisdiction* to federal district courts.

The view that 12 U.S.C. 1975 confers exclusive jurisdiction to the federal district court was crucial for the determination of petitioners rights in their federal case. The district court ruled, however, that the federal case was moot due to the doctrine of res judicata since the Superior Court had entered a judgment that was to be entitled to full faith and credit. However, a judgment entered by a court that lacks jurisdiction over the subject matter does not have preclusive effect and is subject to collateral attack at any time, *Kalb* v. *Fewerstein*, 308 U.S. 433, 60 S. Ct. 343 (1960); *Wellington Computer Graphics, Inc.* v. *Modell*, 315 F. Supp. 24 (S.D.N.Y. 1970); *Moran* v. *Paine, Webber, Jackson & Curtis*, 279 F. Supp. 573 (W.D. Pa. 1967), aff. 389 F.2d 242 (3rd Cir. 1968) and will not be enforced by the courts of the Commonwealth of Puerto Rico. *Pueblo* v. *López*, 67 P.R.R. 732 (1947); *Bolker* v. *Tribunal*, 78 P.R.R. 29 (1955); *E.L.A.* v. *Tribunal*, 86 D.P.R. 656 (1962); *Iturriaga* v. *Fernández*, 78 P.R.R. 29 (1955); *Vidal* v. *Monagas*, 66 P.R.R. 588 (1948) aff. by *Monagas* v. *Vidal*, 170 F.2d 99 (1948).

Néstor and Gloria Cruz and the conjugal partnership included causes of actions under 12 U.S.C. 1975 in their

counterclaim in the Superior Court case.[3] No facts or issues on the merits were decided at the Superior Court case and only a sanctioning judgment was entered. Therefore collateral estoppel does not apply. *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 75 S. Ct. 865 (1955). The fact that Néstor and Gloria Cruz included in the Superior Court case, 12 U.S.C. 1975 causes of action did not bring to the scene *res judicata* effects to those claims since such state court did not have jurisdiction to decide exclusive federal jurisdiction causes of actions. *Moran* v. *Paine, Webber, Jackson & Curtis*, 279 F. Supp. 573, 578 (1976). Thus the courts below should have determined that Néstor and Gloria Cruz and the conjugal partnership could continue litigation of their 12 U.S.C. 1975 causes of action in the federal district court.

In addition, 12 U.S.C. 1978 expressly states that the provisions of the Tying Arrangement Act do not bar any other remedy that a party could have in state or federal courts due to the conduct condemned by the Act. It follows that the remedy created by Congress is an additional one to be prosecuted only in a federal district court. A party could file a tort action in state court and file a 12 U.S.C. 1975 independently in a federal district court which is an additional remedy to deter and bar anticompetitive acts by banks. 12 U.S.C. 1978 defines and gives life to modern day congressional mechanisms intended to protect certain clases of citizens. This type of device has been called a "citizen suit" by this Court recently in *City of Milwaukee* v. *Illinois and Michigan*, ____ U.S. ____, 101 S. Ct. 1784 (1981). The purpose of such enactments is to provide new remedies and causes of actions while

[3]Petitioner Nesglo, Inc., however, did not litigate its claims at the Superior Court since it was not allowed to file an answer with a counterclaim in the Puerto Rico Superior Court.

preserving other remedies that a citizen may have. So a full, partial or incomplete litigation (in which collateral estoppel does not apply)[4] of other actions available does not preclude the additional exclusive and treble damages federal jurisdiction causes of action granted by the Congress under 12 U.S.C. 1972, 1975.

2. The court below ruling misapplied the doctrine of *res juidicata* and statute 28 U.S.C. 1738.

Under Puerto Rico law, to apply the doctrine of *res judicata* the following elements must be presented: A prior case in which the same parties, their heirs, privies or representatives litigated on the merits the same causes of action, facts and objects. 31 P.R.L.A. sec. 3343. The district court below nevertheless concluded that Petitioner's federal case was "moot" due to a *res judicata* reach of the Superior Court judgment. No evidence whatsoever was presented to show that respondent Chase Manhattan Bank had ceased charging clients the "secret interest" charges that it had been sharing with Petitioner Nesglo, Inc. The District Court also erroneously concluded that the Superior Court judgment would be enforceable in the courts of the Commonwealth of Puerto Rico and consequently that it was entitled to full faith and credit by the district court under 28 U.S.C. 1738.

The district court ruling was totally erroneous since it was based on inexistent premises. First of all, there was no identity of parties between the State Court and the federal case. Nesglo, Inc. was not a party claimant in the Superior Court case and as an involuntary party did not have choice of forum. Nesglo, Inc. was not afforded a fair opportunity to litigate its claims although in reliance of a federal

[4]In other words, no issues or facts have been decided on the merits.

Judge order (Honorable Ted Dalton) it tried to file an answer and counterclaim in the Superior Court proceedings. It has been decided by this Honorable Court that the concept of *res judicata* and collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have full and fair opportunity to litigate in the earlier case. *Kremer* v. *Chemical Const. Corp.*, U.S. ____, 102 S. Ct. 1883 (1982); *Allen* v. *McCurry*, ____ U.S. ____, 101 S. Ct. 411 (1980). Nesglo, Inc. could pursue its independent claims in the federal district court since they were of a permissive nature and exclusive federal jurisdiction cause of action could only be pursued before a federal district court. Under pendent and ancilliary jurisdiction Nesglo, Inc. could include state law causes of action. So, Nesglo, Inc., an involuntary defendant at the Superior Court which could elect forum was not required under the requirement of compulsory counterclaims, to file exclusive federal causes of action before the Superior Court. However, the federal district court below erroneously decided that Nesglo's, Inc. federal and exclusive causes of action had to be filed in a compulsory counterclaim in the Superior Court and by not doing so, its claims were precluded by *res judicata* under the concept of "claims that were litigated or could be litigated." Respondents Stanley Zych and Enrique Fernández were not even parties in the Superior Court case.

The district court further misapplied the full faith and credit statute. 28 U.S.C. 1738. Such statute states that federal courts should give full faith and credit to state court judgments which could be enforced by the state which entered it. In the instant case the herein petitioners are not attacking any Superior Court judgment which granted respondent the Chase Manhattan Bank's money claim. Such part of the judgment was entered due to a

sanctioning order. But the herein petitioners vehemently stress that the Superior Court judgment could not foreclose or preclude petitioner's federal exclusive causes of action under 12 U.S.C. 1975. That part of the judgment could not be enforced by any court of the Commonwealth of Puerto Rico since under Puerto Rico case law a judgment or a part of it is void if it lacks jurisdiction over the subject matter. *Pueblo* v. *López,* supra, *E.L.A.* v. *Tribunal,* supra, *Iturriaga* v. *Fernández,* supra, *Vidal* v. *Monagas,* supra. See also *Wellington Computer Graphics, Inc.* v. *Modell,* supra, and *Moran* v. *Paine, Webber, Jackson & Curtis,* supra. And it has been argued that 12 U.S.C. 1975 can only be pursued in federal district courts and constitute an *additional* remedy to any other remedy under state law.

The district court further erroneously concluded, and the Circuit Court agreed and affirmed, that Nesglo, Inc., Néstor Cruz and Gloria Cruz were privies, and that when Néstor and Gloria Cruz litigated their claims in the Superior Court they also litigated as representatives of Nesglo's claims. But Nesglo, Inc., however, is a corporation with separate personality which respondent Chase Manhattan Bank always recognized. Chase contracted with Nesglo, Inc. and maintained a secret joint venture and other relations with Nesglo, Inc. The money collection suit filed by Chase at the Superior Court included only Nesglo, Inc. as sole debtor. It included Néstor and Gloria Cruz as simple guarantors (not jointly bound). Chase Manhattan attached to the Superior Court complaint a contract of guaranty of Néstor and Gloria Cruz. There exists an old corporate doctrine which states that a party who recognizes and execute contracts with a corporation is estopped to deny the corporate personality and to challenge the corporate veil. That doctrine of estoppel is

recognized and contained in the Puerto Rico law of corporations 12 P.R.L.A. 2205. Respondents were then estopped to make any argument that amounted to a belated disregard of Nesglo's corporate veil.

The state judgment dismissing Néstor and Gloria Cruz counterclaims could not affect Nesglo's causes of actions before the federal court since there was no joint and several relation between those petitioners. Néstor and Gloria Cruz acted only as guarantors of Nesglo in the factor lien agreement with respondent Chase Manhattan Bank. In that connection the Supreme Court of Puerto Rico recently ruled that there is no privity relation between a guarantor and a debtor and that a judgment entered in favor of a guarantor cannot be used by the debtor either as "*res judicata*" or as collateral estoppel against creditors. See, *A & P General Contractors v. Associación Cana,* 81 J.T.S. 25, March 13, 1981.[5]

The sole shareholder of Nesglo, Inc. is the petitioner conjugal partnership constituted between Néstor and Gloria Cruz. Such shares were acquired during marriage relationship. No judgment was issued by the Superior Court dismissing any claim of the conjugal partnership. Assuming arguendo that a judgment against a sole shareholder could bind a corporation (which is not admitted), such theory is not applicable since the Superior Court judgment did not make any determination nor include any judgment against the said conjugal partnership.

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[5]In addition the guarantor-debtor relationship only extended to the money claim that respondent Chase collected in the Superior Court. Such limited relation could not be extended to the independent, permissive exclusive federal claims pursued before a federal district court by Nesglo, Inc.

3. Under federal Appellate Rule 4(a-4) separate appeal before a federal circuit court must be filed when new fact findings are made by the trial court after judgment has been entered.

The federal district court entered a first dismissal judgment on December 3, 1980. It was ordered reversed by the making and entry of a "substitute" judgment. The Circuit Court, while retaining jurisdiction ordered the district court below to make findings only under the topic of mootness. The district court went beyond such jurisdictional grant and made findings of facts on the topics of *res judicata* and collateral estoppel. See Hon. Judge Gilberto Gierbolini letter, Appendix page 17. Under Appellate Rule 4(a-4) the herein petitioners had to file a new notice of appeal. This they did by filing appeal no. 83-1166. On April 28, 1983 the Circuit Court erroneously dismissed appeal no. 83-1166 and by doing so violated petitioner's due process rights to brief and appeal their factual and legal arguments.

CONCLUSION

For the above stated reasons it is hereby respectfully requested that a writ of certiorari be issued to the United States Court of Appeals for the First Circuit and that in due course the orders and "substitute" judgment entered below be reversed.

Respectfully submitted,

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July 27, 1983

TRANSLATION

IN THE SUPERIOR COURT OF PUERTO RICO
SAN JUAN PART

THE CHASE MANHATTAN BANK, N.A. Plaintiffs	• •CIVIL NO. •78-7002 (807)
v.	•RE: •FACTOR'S LIEN
NESGLO, INC., NESTOR CRUZ SOTO AND GLORIA D. DE CRUZ Defendants	•CONTRACT • •

OPINION AND JUDGMENT

This case concerns a collection of money complaint filed by The Chase Manhattan Bank, N.A. against Nesglo, Inc., arising from Factor's Lien Contract. Plaintiff also claims from codefendants Néstor Cruz Soto and Gloria D. de Cruz pursuant to a guaranty through which said codefendants became liable to The Chase Manhattan Bank, N.A. for any debts incurred by the corporate codefendant. Subsequent to the start of the suit, plaintiff requested and obtained the attachment of various goods of the codefendants to secure the effectiveness of the judgment that could ultimately be entered in the case in its favor. Some of the goods have already been sold by order of the Court while others remain under its custody.

Defendants began immediately to exhaust their discovery mechanisms and, subsequently, they filed their answer to the complaint and affirmative defenses. Codefendants Néstor Cruz Soto and Gloria D. de Cruz, for their part, filed a Counterclaim claiming damages from plaintiff, thereby enhancing the controversy between the parties.

The file reveals active pursuit of discovery principally on the part of codefendants toward plaintiff The Chase Manhattan Bank, N.A.; it equally appears that while plaintiff has complied fully with its procedural responsibility as regards the discovery submitted by defendants, defendants have been noticeably neglectful as regards the first set of interrogatories submitted by plaintiff to the point that almost eleven months have elapsed since said interrogatories were notified and they still remain unanswered notwithstanding several motions filed by the parties and orders to the effect entered by this Court. Let's look into this.

On June 23, 1980, plaintiff notified each of the codefendants a first set of interrogatories to be answered within the period of time provided by the Rules of Civil Procedure. Defendants having filed no answer to said interrogatories within prescribed period of time, plaintiff appeared on August 6, 1980 informing the Court of defendants' non-compliance with their procedural obligation and requesting the dismissal, with prejudice, of the Counterclaim filed by codefendants Néstor and Gloria Cruz, that default of all codefendants be entered as regards the complaint filed by plaintiff, that codefendants pleadings be stricken from the record, and that default judgment be entered in favor of the plaintiff.

On August 13, codefendants Nesglo, Inc. appeared alone in opposition to the request of The Chase Manhattan Bank, N.A., alleging as the cause of their failure to answer the interrogatories the fact that their attorney has been on vacation and requesting an extension of time of twenty days to file their answer. Considering said reason to be meritorious, this Court granted on May 21st, 1980 the extension of time to answer the interrogatories requested by said codefendant.

Subsequently, on September 15, 1980, plaintiff appeared before the Court informing again that none of the codefendants had answered the interrogatories submitted to them and praying for the remedies previously requested in its motion of August 6. Defendants appeared in opposition thereto on September 17 explaining that the answers were being prepared at that time and requesting a last extension of time of twenty days to answer the interrogatories that had been submitted to them three months earlier. On September 19, 1980 the Court granted codefendants' request for a last extension of time, thereby allowing them until mid-October to notify their answers to interrogatories which, according to them, were already being prepared since September 17.

On January 30, 1981, the plaintiff, The Chase Manhattan Bank, N.A., filed a "Second Motion Requesting the Imposition of Sanctions Under Rule 34 of the Rules of Civil Procedure of 1979," which actually was its third motion if we consider the motion previously referred to. In said motion, plaintiff pointed out that seven months had elapsed since the interrogatories were notified to the defendants and that various terms granted to defendants, both under the Rules of Civil Procedure and pursuant to orders of the Court, had also elapsed without defendants having submitted their answers which allegedly were being prepared since mid-September, 1980. Again plaintiff requested the dismissal of the Counterclaim, that defendants pleadings be stricken, that their default be entered, and that judgment by default be entered in accordance with the allegations of the complaint.

This being the situation, and considering the merits of plaintiff's position, we granted defendants a term within which to reply, subject to sanction should they fail to appear. Defendants, indeed, appeared by way of a new mo-

tion for extension of time dated February 9, 1981. The defendants explained that at that time they had already finished preparing the answers to the interrogatories, and that the only thing which still remained pending before they could be remitted to plaintiff was the signature and oath of the various codefendants. For this purpose, defendants requested an additional ten days within which to submit their answers notwithstanding the fact that approximately eight months had elapsed since the interrogatories were notified to them and almost four months had elapsed since they were granted the "last extension of time" requested by then.

The Court at that time found that the ends of justice would be better served by allowing defendants to submit their answers, notwithstanding their tardiness, and as a result thereon, on February 12 we granted defendants the additional ten days as requested.

The Court now has before it a "Third Motion Requesting the Imposition of Sanctions under Rule 34 of the Rules of Civil Procedure of 1979," which, as we have previously pointed out, it is actually the fourth motion filed by plaintiff due to the open contumacy displayed by the defendants.

Plaintiff informs that more than eleven months have elapsed since defendants were notified with the first set of interrogatories, and that defendants have still failed to submit their answers to them.

The attention of the Court is drawn to the fact that during mid-September, 1980, defendants informed the Court that the answers to the interrogatories submitted by plaintiff were being prepared at that time. Even more interesting is the fact that defendants informed the Court

approximately three months ago that said answers were already prepared, pending merely their oath and signature. Nevertheless, after almost a year since said interrogatories were notified to defendants and after multiple extensions of time were granted, the answers have still not been submitted.

The Court finds no justification whatsoever for the open resistance displayed by defendants to the discovery requested of them. We also fail to find any justification to deny further the just request of plaintiff, made for the fourth time, in light of defendants' open and clear contumacy.

Although the Court is aware of its duty to promote a liberal system of discovery of evidence, the Court also has an obligation to look after the compliance with the most basic rules of justice which require that all proceedings be construed so as to secure the just, speedy and inexpensive determination of every action. The facts of this case demonstrate an open disregard, not only of the obligations imposed upon defendants by the Rules of Civil Procedure, but also for the requests of plaintiff and the tolerance of this Court.

The Court is of the opinion that the present case is an example of what Rules 34.2 and 34.4 of the Rules of Civil Procedure are meant to avoid by providing a procedure whereby sanction can be imposed upon those parties who in a given suit have been intentionally neglectful or have engaged in deliberate disregard of their obligations under the rules of procedure which establish the parameters of the discovery mechanisms.

For example, Rule 34.2 of the Rules of Civil Procedure of 1979 provides that upon non-compliance by a party

with an order entered by the Court compelling said party to comply with any given discovery mechanisms, the Court can order:

(a) that said party's pleadings be stricken. *French* v. *Zalstem-Zalessky*, 1 F.R.D. 240 (D.C. N.Y. 1940); *Conrad Music* v. *Modern Distributors*, 433 F. Supp. 269 (D.C. Cal. 1977);

(b) the dismissal with prejudice of said party's complaint or counterclaim, see *Thorn* v. *Harrisburg Trust Co.*, 32 F.R.D. 352 (D.C. Pa. 1962), affirmed in 316 F.2d 237 (3rd Cir. 1963); *Brookdale Mill* v. *Rowley*, 218 F.2d 728 (6th Cir. 1954);

(c) that default judgment be entered against the same, see *Sivelle v. Maloof*, 373 F.2d 520 (1st Cir. 1967); *Baltimore Transit Co.* v. *Mezzanotti*, 174 A.2d 768 (Md. 1961); *Conrad Music* v. *Modern Distributors, supra.*

Likewise, Rule 34.4 provides for the imposition of the foregoing sanctions whenever a party fails to submit answers or fails to object to interrogatories notified in accordance with Rule 30 of the Rules of Civil Procedure, or fails to submit a written answer to a request for the production of documents under Rule 31.

It is a well settled legal doctrine that the main purpose for the use of discovery procedures by a party in a given case consists of the necessity that said party has to prepare himself for the trial on its merits, to reduce the possibility of surprise in the case, to delimit the issues presented, and to accelerate the development of the case and save the judicial energies of a Court. See, *Sierra* v. *Tribunal Superior*, 81 D.P.R. 554 (1959); *Burns* v. *Thiokol Chemical Corp.*, 483 F.2d 300 (5th Cir. 1973); *U.S.* v. *International Business Machines Corp.*, 68 F.R.D. 315

(D.C. N.Y. 1975); *Dienstag* v. *Bronsen,* 49 F.R.D. 327 (D.C. N.Y. 1970); *Carlson Companies, Inc.* v. *Sperry & Hutchinson Co.,* 374 F. Supp. 1080 (D.C. Minn. 1974).

In like manner, it has been affirmatively recognized that courts have ample discretion to impose sanctions to a party who in an intentional and voluntary manner, demonstrated by his acts in a case, does not comply with the discovery procedures initiated by another party pursuant to the applicable Rules of Civil Procedure. To this effect, our Supreme Court, in the case of *Hartman* v. *Tribunal Superior,* 98 P.R.R. 122 (1969), at pp. 130-31 stated:

> "Rule 34.4 authorizes the imposition of drastic sanctions when a party willfully fails to make discovery of evidence, as for example, the answer to interrogatories. In such cases, it is proper to impose sanctions even though resort is taken to court to obtain an order to that effect . . . In *Peña* v. *Heirs of Blondet,* 72 P.R.R. 8, 12 (1951), we said that a party has acted 'willfully' in failing to make discovery when 'it is proved that the party has acted in a dilatory or contumacious way when it has refused to answer the interrogatories or has answered them in an evasive way . . .' This drastic remedy should be applied only in extreme circumstances." (Citations omitted)

See, to that effect, *National Hockey League* v. *Metropolitan Hockey Club,* 427 U.S. 639, 49 L.Ed.2d 747; *G-K Properties* v.*7 Redevelopment Agency of City of San José,* 577 F.2d 645 (9th Cir. 1978); *Margoles* v. *Johns,* 5878 F.2d 885 (7th Cir. 1978); *Krieger* v. *Texaco, Inc.,* 373 F. Supp. 108 (D.C. N.Y. 1973); *Díaz* v. *Southern Drilling Corp.,* 4278 F.2d 1118 (5th Cir. 1970), *cert. den.,* 400 U.S. 878, 27 L.Ed. 2d 115 (1970); *Riverside Memorial Mausoleum, Inc.* v. *Sonnenblick-Goldman Corp.,* 80 F.R.D. 433

(D.C. Pa. 1978); *Vac-Air, Inc.* v. *John Mohr & Sons Inc.*, 53 F.R.D. 319 (D.C. Wis. 1971).

After an analysis of the records of the case and the various motions filed by the parties in relation with the interrogatories for which sanctions are requested in this case, the Court concluded that the defendants undoubtedly have been acting in an intentional and voluntary manner in terms of their obstinate evasion of the interrogatories served on them.

The fact that the defendants have not yet answered the interrogatories submitted to them after eleven (11) months of having been received and after several orders from the Court granting them additional terms, last terms and final terms within which to answer them, is clearly sufficient for the Court to impose the sanctions requested. If we add to the former the fact that said defendants have been inducing the Court to believe that said answers were ready three (3) months ago, or that they have been in the process of being prepared for eight (8) months, the conclusion that the defendant has been intentionally resisting the discovery requested is inevitable. We must bear in mind that any effective resistance to the discovery, either in a subtle or open manner, shall be penalized by the Court. *Girard Industries Corp.* v. *Tribunal Superior,* 103 D.P.R. 680 (1975).

The Court has been extremely indulgent with the defendant, considering at all times that the imposition of sanctions to a party shall be applied in a restrictive way, and bearing in mind the general rule recognized by our highest Court in the case of *Hartman* v. *Tribunal Superior, supra,* to the effect that:

> "A Court has the responsibility to do justice between man and man; and general principles cannot justify denial of a party's fair day in court except upon a serious showing of willful default."

We add to this that the responsibility of making justice is an indispensable prerogative of this Court and in no way can it be delegated to one of the parties, which is what would happen in the present case if we do not impose the sanctions requested by the plaintiff.

Based on the aforementioned, we cannot but conclude that in the present controversy the defendant has intentionally failed to comply with its responsibility of answering the interrogatories served on him; a conclusion further supported by the fact that even after being notified of the imposition of sanctions on February, 1981, said party still demonstrates the same negligence as several months back. This Court is not in the position of forcing the plaintiff, The Chase Manhattan Bank, N.A., who has been responsibly fulfilling its procedural obligations in this case, to keep incurring attorneys' fees after unsuccessfully trying, in more than four occasions, to obtain the answers to the interrogatories which it served a year ago.

Rule 1 of the Rules of Civil Procedure of 1979 provides that the Rules of Civil Procedure will be construed in a way that will guarantee . . . "a just, speedy and inexpensive determination of every action." This Court and the plaintiff, Chase, rightfully deserve that said rule be applied with accuracy.

The fact that the answers to the interrogatories have not yet been notified, notwithstanding what was expressed by the defendant in its motion of February 9, 1981 requesting

a "second last extension" eight months after having received the interrogatories and after several orders by the Court granting it additional terms within which to answer, convinces the Court that said party is not meritorious of additional opportunities besides those that have already been granted. He who hinders the responsible and fair imposition of justice should not ask this Court for justice.

Based on the aforementioned, the "Third Motion Requesting Imposition of Sanctions Under Rule 34 of the Rules of Civil Procedure of 1979" filed by the plaintiff on May 8, 1981 is granted, and judgment is hereby rendered, dismissing, with prejudice, the Counterclaim filed by codefendants Néstor Cruz Soto and Gloria D. de Cruz against plaintiff, Chase Manhattan Bank, N.A., and each and every one of the allegations made in this case by said codefendants, pursuant to the provisions of Rule 34 of the Rules of Civil Procedure of 1979.

With respect to codefendant Nesglo, Inc., the Court further eliminates each and every one of its allegations in this case, pursuant to the provisions of Rule 34. In addition, based on the aforementioned, on the allegations of the complaint and on the rest of the documents which form part of the record of this case, the default of all codefendants, pursuant to the provisions of Rule 34 of granting the complaint filed by plaintiff, The Chase Manhattan Bank, N.A., against codefendants Nesglo, Inc., Néstor Cruz Soto and Gloria D. de Cruz, with the following instructions:

(A) Codefendants Nesglo, Inc., Néstor Cruz Soto and Gloria D. de Cruz are sentenced, severally, to pay to the plaintiff, The Chase Manhattan Bank, N.A., the principal sum of $460,000.00 plus the legal interest since November 10, 1978, plus the amount of $46,000.00 on account of costs, expenses and attorneys' fees.

B) The Clerk of this Court is hereby ordered to deliver to the plaintiff all funds which have been deposited in Court in this case, to be applied to the payment of the sentence, including the proceeds of the sale to Heroe, Inc. of the inventory attached in favor of the plaintiff, The Chase Manhattan Bank, N.A., which to this date amount $60,000,000, and including the amount of $5,710.29 deposited by the defendant through Motion dated February 12, 1979, together with any other funds which have had been deposited in the Court.

(C) The plaintiff, Chase Manhattan Bank, N.A., is hereby released of having to deposit in Court the remainder of the proceeds of the sale of the inventory to Heroe, Inc.[1]

DONE AND ORDERED.

In San Juan, Puerto Rico, on the 15th day of May, 1981.

(signed) Pedro J. Martínez
SUPERIOR COURT JUDGE

[1]Even when on May 14, 1981, codefendants filed an Informative Motion in this Court indicating that they had sent the answers to the interrogatories which the plaintiff had served them eleven (11) months before, such delayed notification does not cure in any way the absolute lack of diligence of the defendants in answering the interrogatories, even when this Court had afforded them multiple opportunities to do so. What it really demonstrates is that even when the preparation of the answers to the interrogatories was completed by February 9, 1981, according to defendants' motion of May 14, 1981, the defendants intentionally and without consideration to the orders of this Court and to the procedural right of plaintiff, failed to notify said answers until after approximately three (3) months of having them ready, and after the plaintiff filed a third (or fourth) motion requesting sanctions. This fact by itself demonstrates the absolute lack of diligence of the defendants in complying with their procedural responsibilities pursuant to the Rules of Civil Procedure, and based on said fact and for the reasons expressed in this Opinion and Judgment, this Court reaffirms the Resolution that was taken in this case.

IN THE SUPERIOR COURT OF PUERTO RICO
SAN JUAN PART

THE CHASE MANHATTAN BANK, N.A.	*	CIVIL No. 78-7002 (807)
Plaintiffs		
v.	*	RE
	*	
NESGLO, INC.,	*	FACTOR'S LIEN
NESTOR CRUZ SOTO AND	*	CONTRACT
GLORIA D. DE CRUZ	*	
Defendants	*	
	*	

AMENDED JUDGMENT

Considered the Motion entitled "Motion for Reconsideration pursuant to Rule 43.5 of the Rules of Civil Procedure" filed by the intervening party Albert Rebel & Associates on May 28, 1981, and in view of the merits of the same, this Court orders the freezing of the funds deposited in the Clerk's office of this Court up to the sum claimed by the intervening party in its intervention petition, that is, the amount of $53,138.11, pending the resolution of the Petition for Certiorari filed by the defendant with respect to the legal basis of the requested intervention which was granted by this Court of pending the resolution by this Court of the merits of the intervention petition in the event the Supreme Court denies the Petition for Certiorari referred to.

In view of the disposition that is hereby made with respect to the claim by the intervening party, we find that there does not exist just cause for delaying or postponing the rendering of a final judgment on the rest of the claims in the case as it

was ordered in our Judgment of May 15, 1981, which we ratify in all its parts, pending the eventual resolution of the claim by the interventor. In view of the above, we order the Amendment of the aforementioned Judgment in accordance to what is hereby expressed.

DONE AND ORDERED.

At San Juan, Puerto Rico, this 22nd day of June, 1981.

(signed) Pedro J. Martínez

SUPERIOR COURT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 81-1097

NESGLO, INC., ET AL.,
Plaintiffs, Appellants,

v.

THE CHASE MANHATTAN BANK, N.A., ET AL.,
Defendants, Appellees.

Before COFFIN, *Chief Judge*,
ALDRICH and BREYER, *Circuit Judges*.

ORDER OF COURT

Entered: September 14, 1981

The court, while retaining jurisdiction, remands this matter to the District Court for the purpose of receiving from the parties acceptable translations of such pleadings, docket entries, court actions, and other papers relating to litigation in the courts of the Commonwealth of Puerto Rico as may be relevant to the question whether such litigation may have rendered the instant appeal moot, and for the purpose to expeditiously deciding the issue of mootness and reporting its findings and conclusions to this court.

The parties have agreed to cooperate in assembling the necessary materials without delay. They are to share equally in advancing such monies as may be necessary, the

ultimate allocation of such expenses to abide final decision.

By the Court:

/s/ DANA H. GALLUP
Clerk.

[Cert. c: Clerk, U.S.D.C., P.R.; cc: Messrs. Salas Garcia and Garcia Gregory]

November 23, 1982

Mr. Dana H. Gallup
United States Court of Appeals
for the First Circuit
1606 John W. McCormack
Post Office and Courthouse
Boston, Mass. 02109

Re: No. 81-1097 NESGLO, INC., et al v.
THE CHASE MANHATTAN BANK, N.A.
District Court No. 79-1674

Dear Mr. Gallup:

I acknowledge with thanks your letter of November 19, 1932 regarding the above referenced case.

It should be noted that numerous documents consisting of hundreds of pages were presented at the hearing held on February 26, 1982. Although it is correct that the docket shows that the last briefs were filed during the month of March, the complexity of the question involved and my crowded calendar have prevented me from disposing of the case in a more expeditious manner.

Another reason for the delay is that in addition to the mootness issue mentioned in the Court of Appeals' Order of September 14, 1981, we ordered the parties to brief the related issues of *res judicata* and collateral estoppel.

Our opinion and order is already in a second draft and is running over forty pages. I expect to be ready to file the same in final form within the next fifteen days.

Cordially,
Gilberto Gierbolini

cc: Edelmiro Salas Garcıá, Esq.
Jay Garcıá Gregory, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

NESGLO, INC., et al	*	
Plaintiffs	*	
v,	*	CIVIL No. 79-1674 GG
	*	
THE CHASE MANHATTAN	*	
BANK, N.A. et al	*	
Defendants	*	
	*	

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND MEMORANDUM OPINION

In our Opinion and Order of December 2, 1980 we dismissed the complaint in this case *Nesglo, Inc. v. Chase Manhattan Bank, N.A.*, 506 F. Supp. 254 (DCPR 1980); however, parallel proceedings were being carried out in the state local courts which continued their course. Our dismissal of the complaint was appealed to the United States Court of Appeals for the First Circuit and on September 14, 1981 that court entered the following order:

> "This Court, while retaining jurisdiction, remands this matter to the District Court for the purpose of receiving from the parties acceptable translations of such pleadings, docket entries, court actions, and other papers relating to litigation in the courts of the Commonwealth of Puerto Rico as may be relevant to the question whether such litigation may have rendered the instant appeal moot, and for the purpose to expeditiously deciding the issue of mootness and reporting its findings and conclusions to this court.

> The parties have agreed to cooperate in assembling the necessary materials without delay. They are to share equally in advancing such monies as may be necessary, the ultimate allocation of such expenses to abide final decision."

In compliance with the aforementioned order, the parties were instructed to file the necessary documents. We also ordered the parties to brief and argue the related matters of *res judicata* and collateral estoppel.

The case was scheduled for hearing but at that time the parties had not reached an agreement as to the documents to be submitted or the translations required. Disagreements between the parties continued. After substantial delays due to that fact, the parties filed legal memoranda which were examined and again we set all the pending matters for oral argument. For the second time we afforded the parties an opportunity to provide the officially certified translation of the state court documents which were finally filed after extended procrastination. Oral arguments were heard and thereafter the parties requested and were granted an additional opportunity to expand upon the argument made. The additional memoranda were filed and the case was taken under advisement.

After a careful evaluation of all the documentary evidence, the oral arguments and the extensive legal memoranda filed by the parties, we enter the following basic findings of fact and conclusions of law which will be supplemented in the Memorandum Opinion.

Findings Of Fact

1. The parties or their privies in the state court action pending when we initially dismissed the complaint in this

case, are the same as those participating in the instant proceedings.

2. The claim and/or defenses raised in the state court proceedings are substantially the same as those before this court.

3. There is a common nucleus of operative facts giving rise to both the state and federal court claims.

4. The plaintiffs in this case, defendants and counterclaimants and their privies in state court, had a full and fair opportunity to litigate their claims against the present defendants (plaintiff and its privies in state court).

5. In the exercise of its valid and proper jurisdiction, the state court dismissed plaintiffs' claims and/or defenses with prejudice for their willful and intentional failure to comply with a discovery order under rules of civil procedure identical to those governing civil actions for the federal district court.

6. The state court judgment become final, firm and unappealable when the state supreme court denied review.

7. No further review of the state court proceedings was sought by the present plaintiffs.

Based on the foregoing findings of fact, we reach the following:

Conclusions Of Law

1. This court must accord full faith and credit to the state court judgment pursuant to 28 U.S.C. Sec. 1738.

2. By virtue of the full faith and credit statute, this court must give preclusive effect to the state court judgment.

3. In view of the fact that the state court judgment disposes of the pending controversy between the parties, the present action has been rendered moot.

Due to the complex procedural history of the present case, a more detailed analysis of the factual framework and the underlying legal theories – both local and federal – upon which it rests, is required. Therefore, we issue the following:

Memorandum Opinion

On or about November 9, 1978, defendant The Chase Manhattan Bank, N.A. (Chase) initiated a collection of monies and factor's lien suit in the Superior Court of Puerto Rico, San Juan Part (the state court) against plaintiffs Nesglo, Inc. (Nesglo), Néstor Cruz Soto (Néstor) and Gloria D. de Cruz (Gloria).

The complaint alleged that Nesglo had defaulted on a loan and factor's lien contract and owed Chase $460,000 plus interest and $46,000 in legal fees. It requested entry of judgment against Nesglo, Néstor and Gloria in the aforementioned sums of money and, pursuant to the terms of the loan documents[1] including the factor's lien contract, that the court order the transfer to Chase of all Nesglo's inventory, accounts receivable, and related utilities.

Simultaneously with the filing of the complaint, Chase moved for attachment of Nesglo's inventory, accounts receivable, ledgers, and other assets described in its motion to that effect. Chase also requested the appointment

[1] They consist of the Factor's Lien Contract (Exhibit A), Note (Exhibit B), Continuous and Unlimited Guaranty (Exhibit C), and Collateral Agreement (Exhibit D).

of defendants Stanley Zych (Zych) and Enrique Fernández (Fernández) both officers of the Bank, as custodians of the property to be attached.

On November 15, 1978 the state court issued an attachment order granting Chase's motion to secure the effectiveness of judgment, and appointed Zych and Fernández as custodians of the property to be attached. The court also issued orders attaching personal real estate and other property belonging to guarantors Néstor and Gloria. Corresponding writs were also issued and Chase designated the Nesglo goods to be attached.

The attachment was executed by the state court marshals and an inventory prepared, copy of which was delivered to Fernández.

On February 17, 1979 Chase moved for summary judgment accompanying a sworn statement by Mr. Luis Ledee, an officer of the Bank.

On February 27, 1979 Néstor and Gloria replied to Chase's motion for summary judgment denying that they or Nesglo owed any money to Chase and that, in any event, Chase collected usurious interest from Nesglo, the latter being a close corporation.

On or around March 26, 1979 defendants Néstor and Gloria filed a motion accompanying a sworn statement by Néstor dated March 19, 1979. Together with Nesglo, they also filed an answer to Chase's complaint raising a series of affirmatives defenses very similar to the allegations found in their complaint before this court. Néstor and Gloria also filed a counterclaim, sworn to by Néstor, as president of Nesglo, and a motion to join Zych and Fernández as defendants.

Néstor's sworn statement dated March 19, 1979 alleged that there was no credit due to Chase from Nesglo, that Chase had not credited certain amounts to Nesglo, had misappropriated certain funds, had refused to honor certain letters of credit, had not given an accounting to Nesglo, had charged Nesglo illegal interest and had imposed certain burdensome and anticompetitive conditions on Nesglo such as forbidding Nesglo to do business with other financial institutions and favoring competitors of Nesglo, also clients of the Bank.

The answer and affirmative defenses filed by Nesglo, Néstor and Gloria generally deny the allegations of Chase's complaint and raise as affirmative defenses fraud, deceit and material misrepresentations, lack of consideration, lack of compliance by Chase of its own obligations, compensation, novation, estoppel and unjust enrichment. They also adduce a defense that Chase violated the Commerce Code of Puerto Rico, the Tie-in Amendments to the Bank Holding Company Act of 1970, P.L. 91-607, Title I, Sec. 106(a) et seq., 12 U.S.C. 1971, et seq. (the Tie-in Amendments), the usury statutes of Puerto Rico and those found in the national banking laws, 12 U.S.C. Secs. 85 and 86.

Néstor and Gloria's counterclaim incorporates the previous affirmative defenses and pleads claims for relief very similar to those pleaded by them and Nesglo before this court. They also name Zych and Fernández as counterdefendants in the third cause of action of the counterclaim.

In essence, the counterclaim seeks damages arising out of the commercial contractual relationship between Nesglo and Chase because of violations of the Tie-in Amendments; usurious interest under both the federal

banking and local laws; federal and local civil rights violations arising out of Chase's, Zych's and Fernández attachment of Nesglo's goods, accounts receivable, ledgers and other property; violations of the Commerce Code of Puerto Rico due to the exaction of interest over interest; general breach of contract theories under the laws of Puerto Rico as well as lack of an accounting by Chase; and false and material misrepresentations relating to the promissory note sought to be collected by Chase.

Simultaneously with the filing of the foregoing pleadings, Néstor and Gloria moved to have Zych and Fernández joined as party counterdefendants to the suit. The motion asserted that these Chase officers were indispensable parties with respect to the alleged illegality of the attachment.

On April 25, 1979 Chase moved to dismiss Néstor's and Gloria's counterclaim before the state court. Néstor and Gloria opposed Chase's motion to dismiss asserting, *inter alia,* that their counterclaim arose from facts and transactions intertwined with the breach of the factor's lien agreement sought to be enforced by Chase. They also stressed their standing to sue under the federal Tie-in Amendments and the Civil Code of Puerto Rico because of their status as sole stockholders and joint and several guarantors of Nesglo by virtue of which they, as guarantors, could interpose against Chase, as creditor, the same defenses and causes of action of debtor Nesglo under the theory that debtors and guarantors are in the same procedural posture *vis a vis* their common creditor.

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[2]"As requested" in the courts of Puerto Rico is the equivalent of "Granted and so ordered" in federal court.

tion to dismiss their counterclaim. Chase then filed a petition for certiorari (interlocutory appeal) from the trial court's decision. The Supreme Court of Puerto Rico denied the petition on October 11, 1979.

Contemporaneously with their opposition to Chase's motion to dismiss their counterclaim, Néstor and Gloria also challenged the legality of the attachment sought by Chase at the commencement of the action in the state court. Chase opposed on the basis of the rights it had arising from the factor's lien contract and applicable Puerto Rican law.

On October 10, 1979 the state court granted Chase's opposition "as requested".

Chase also moved for the sale of all attached goods consisting of Nesglo's inventory, accounts receivable and cash invoking the powers that Nesglo had granted it pursuant to the factor's lien contract. The court granted Chase's request and Gloria and Néstor moved, on behalf of Nesglo, for reconsideration of said order attacking the requested sale under federal and local due process grants. This motion for reconsideration was denied.

By this time, Néstor, Gloria and Nesglo had commenced the instant action in federal court. During April 1980 this case was temporarily assigned to the Honorable Ted Dalton, Senior District Judge of the Western District of Virginia, sitting by designation. After a series of unsuccessful settlement conferences, Judge Dalton entered an order suggesting that the parties proceed with the concurrent state action.

After Judge Dalton's suggestion, Nesglo filed in the state court a document containing an answer, affirmative defenses and counterclaim. Together with Néstor and

Gloria it also requested that the state court issue summons directed to Zych and Fernández as potential third party defendants. As part of the grounds advanced for the issuance of summons, Nesglo, Néstor and Gloria referred to this action as it stood at that time (May 6, 1980) before this court, also mentioning identity of parties and causes of action in both suits. As per such request, the court entered an order on May 29, 1980 directing issuance of summons against Zych and Fernández, who were duly served with process.

Chase replied and moved to dismiss Nesglo's counterclaim and/or third party complaint. It also objected to Nesglo's amendment to plaintiff's prior answer and affirmative defenses of March 26, 1979.

On June 2, 1980 Nesglo, Néstor and Gloria opposed Chase's motion arguing, *inter alia*, that Nesglo had not answered the complaint initially. Chase replied and in due course the state court granted Chase's motion and denied Nesglo, Néstor, and Gloria's June 2 opposing motion.

Nesglo, Néstor and Gloria then filed a motion for reconsideration of the aforementioned order and Chase opposed. On July 18, 1980 the state court entered an order denying the aforementioned motion for reconsideration. There is no evidence that this order was ever appealed to the state supreme court.

Meanwhile, Chase also moved to dismiss Nesglo, Néstor and Gloria's counterclaim and/or third party complaint claiming that since the counterclaim had been dismissed as to Chase, it could not be asserted against Zych and Fernández. It was also claimed that as a third party complaint it was procedurally incorrect. The state court agreed.

On September 9, 1980 Nesglo, Néstor and Gloria filed a sworn informative motion before the state supreme court in a pending collateral incident before said court,[3] wherein they represented that as of September 9, 1980[4] Nesglo was a defendant and counterdefendant in the state court proceedings. Thereafter, on October 15, 1980, the state court granted Chase's opposition to a partial motion for summary judgment filed by Nesglo, Néstor and Gloria.

On December 2, 1980 we entered an opinion and order dismissing the instant action and Nesglo, Néstor and Gloria appealed to the United States Court of Appeals for the First Circuit. While said appeal was pending, one very important event took place in the local proceedings. The state court issued an Opinion and Judgment dated May 15, 1981, striking all of Nesglo, Néstor and Gloria's answers and affirmative defenses and dismissing with prejudice Néstor' and Gloria's counterclaim against Chase. The court also entered the default of defendants and rendered judgment in favor of Chase for the full amount of outstanding indebtedness plus interest, costs and attorney's fees.

In its opinion, the state court, after an extended recitation of the deplorable history of the discovery pro-

[3]The incident involved a motion to intevene filed by a creditor of Nesglo, Albert E. Rebel & Associates, Inc. ("Rebel") that claimed a preference in its credit to that of Chase. Nesglo, Néstor and Gloria intervened to correct some alleged factual misrepresentations made by Chase in its petition for certiorari. The supreme court finally issued an opinion on November 1981 clarifying the criteria to determine whether Chase's factor's lien credit was of superior rank to that of Rebel. In passing, the court considered the state court judgment against Chase to be final, firm and unappealable. The court did not take into consideration Nesglo's averments in its informative motion. See, *Nesglo, Inc. v. Chase Manhattan Bank*, 81 JTS 108 (1981).

[4]By this date, the state court had dismissed Nesglo's May 6, 1980 counterclaim and had denied reconsideration of its order.

ceedings, found as a matter of fact that Nesglo, Néstor and Gloria had willfully failed to comply with its discovery orders and had, through their misconduct, abused the state adjudicatory process. (See Document No. 49).

Nesglo, Néstor and Gloria then filed a motion for reconsideration and simultaneously petitioned the state supreme court for a writ of certiorari to review the state court's order of October 15, 1980 denying their partial motion for summary judgment. They emphasized that concurrently with the state court proceedings, they had

> "/*f*/iled a Complaint in the United States District Court for the District of Puerto Rico, in which the same parties and basically the same facts are involved, and have also filed and */sic/* appeal before the First Circuit Court in Boston for which said court has set September 2 for oral argument as to the legal basis for said appeal. Exhibit 2".

The state court denied this motion for reconsideration on June 3, 1981.

The petition for certiorari having failed, Nesglo, Néstor and Gloria filed a petition for review again before the state supreme court. In this last petition they referred to some exhibits in their motion for reconsideration and stated that it consisted of:

* * *

> "(b) Copy of appellants brief filed before the United States Court of Appeals for the First Circuit in Boston, *in a case between the same parties resulting from the same controversies;* . . . " (Emphasis supplied)

Meanwhile, on June 22, 1981, the state supreme court denied the petition for certiorari from the interlocutory

order of October 15, 1980 denying Nesglo, Néstor and Gloria's motion for partial summary judgment. The court considered the petition to be frivolous and imposed sanctions on petitioners consisting of $500.00 for attorney's fees.

Two motions for reconsideration of this supreme court resolution were filed and both were denied. The petition for review was likewise denied on August 6, 1981 and a motion to reconsider said denial was also rejected on September 4, 1981.

Mandates from all state supreme court proceedings were issued and the case returned to the state court on October 13, 1981 (Petition for Review) and on October 19, 1981 (certiorari).

No evidence in the record exist that Nesglo, Néstor and Gloria perfected an appeal or petition for certiorari to the Supreme Court of the United States from the state supreme court decisions during the pendency of the proceedings before us, as authorized by 28 U.S.C. 1257.

We shall now discuss the legal significance of the aforementioned findings of fact and their bearing on the ultimate issue of mootness.

Plaintiff initially contend that they have not been afforded an adequate opportunity to argue the issue of mootness because defendants should have been required to state their position first. This contention is frivolous. While it is true that initial memoranda of law were filed simultaneously by both parties, we later held oral argument on all issues raised therein, and plaintiffs were afforded a reasonable opportunity to rebut defendants' assertions. Indeed, at the close of argument, we invited the parties to file additional memoranda so that each could

have one last opportunity to discuss the issues raised in their respective briefs and motions.

As to the issue of mootness, we start with the often cited definition given in *Powell v. McCormack,* 395 U.S. 486, 496:

> "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."

Proper disposition of the mootness issue in this case is thus governed by those Supreme Court cases recognizing that an intervening judicial decision in a collateral proceeding may moot a parallel action pending in another court. *Murphy v. Hunt,* 455 U.S. 478 (1982) (civil rights suit brought in federal district court by sex offender challenging a state's constitutional provision restricting bail, on basis of Eight Amendment's prohibition of excessive bail, held to have been rendered moot by intervening state court conviction); *Patterson v. Warner,* 415 U.S. 303 (1974) reh. den. 416 U.S. 952 (upholding constitutionality of state statute vacated on direct appeal to Supreme Court and case remanded for district court's initial consideration of whether action was rendered moot by an intervening state court decision);[5] *Aikens v. California,* 405 U.S. 813 (1972) reh. den. 406 U.S. 978 (court dismisses writ of certiorari on the ground that issue on which writ was granted had been rendered moot by an intervening state court decision); *Lowe v. Duckworth,* 663 F.2d 42 (7th Cir. 1981) (federal habeas corpus petition rendered moot on appeal by intervening state court deci-

[5]The procedure used by the Supreme Court in this case to determine mootness – whether a live case or controversy has ceased to exist between the parties on appeal – closely resembles the procedure used herein by the First Circuit Court of Appeals. 415 U.S. at 306.

sion ordering a new trial. Since the court granted the relief sought, there was termination of the live controversy between the parties).

The argument of "voluntary cessation" urged by plaintiffs and expounded in *County of Los Angeles v. Davis*, 440 U.S. 625 (1979) and followed in *Free v. Landrieu*, 666 F.2d 698 (1st Cir. 1981), is not applicable to the facts of this case. As previously stated, we will decide the issue on whether the intervening state judgment fully disposed of the pending controversy between the parties and if so, whether we must accord said judgment full faith and credit pursuant to 28 U.S.C. 1738.

The state court judgment of May 15, 1981 is now final, firm and unappealable. We will now determine whether it should be accorded full *res judicata* effects in this court by virtue of the federal full-faith-and-credit statute. As the Supreme Court recently observed:

> "As one of its first acts, Congress directed that all United States Courts afford the same full-faith-and-credit to state court judgments that would apply in the State's own Courts. Act of May 26, 1790, Ch. 11, 1 Stat. 122, 28 U.S.C. Sec. 1738."
>
> *Kremer v. Chemical Construction Corp.*, 102 S.Ct. 1883 (1982) cert. den. 103 S.Ct. 20.[6]

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[6]In *Kremer* the Court held that a state court judgment upholding a state agency's rejection of an employment discrimination claim, which would have *res judicata* effects in the state's own courts, precludes a federal action under Title VII of the 1964 Civil Rights Act on the same claim of employment discrimination. In so doing, the Court considerably narrowed the scope of judicial exceptions to the preclusive command of 28 U.S.C. Sec. 1738 in the context of relitigation of federal claims originally filed and disposed on in the federal state courts.

If in Puerto Rico a court would give preclusive effects to the state court judgment of May 15, 1981 and the other ancillary decisions made by both the state and supreme courts, then Section 1738 commands that this court do likewise. As we have said earlier, the end effect, consistent with one of the cardinal purposes behind *res judicata,* would be to obliterate any case or controversy hitherto extant between opposing parties to the suit.

In assessing the effects of the state court proceedings we follow the rules laid down by the United States Court of Appeals for the First Circuit in *General Foods v. Mass. Dept. of Public Health,* 648 F.2d 784, 785-786 (1st Cir. 1981) for cases falling within the federal question jurisdiction of federal courts (challenge to state regulations on federal grounds in federal court by members of association previously litigating the issue in state court).

> ". . . /*w*/here the State Court rendering the judgment would give it preclusive effect, federal courts must give it such preclusive effect. /Citations omitted/ . . . /*and*/ . . . /*w*/here the State Court rendering the judgment would not give it preclusive effect, the federal courts would not give it such preclusive effect."

Furthermore, it is now well settled that in Puerto Rico, "the doctrine of res judicata, *res judicata pro veritate habetur,* is . . . part of /*its*/ Civil Law, and except, for comparative purposes /*t*he cour*ts*/ need not resort to other sources for its analysis". *Republic Security Corporation v. The Puerto Rico Aqueduct and Sewers Authority,* 674 F.2d 952, 955-956, n. 4 (1st Cir. 1982) quoting from *Lausell Marxuach v. Díaz de Yañez,* 103 D.P.R. 533, 535 (1975).

As recently described by this court, after a remand from the First Circuit of Appeals,[7] quoting from a leading Puerto Rico Supreme Court case:[8]

> " 'In general terms, it may be affirmed that the rule of res judicata is based on considerations of public policy and necessity: on the one hand, the interest of the State in terminating litigations in order that judicial issues may not be perpetuated, . . ., and, on the other hand, the desirability of not submitting a citizen twice to the inconveniences which the litigation of the same cause entails . . . *In its origin it presupposed an adversative or litigious proceeding and an adjudication on the merits. However, the complexities of the modern proceeding and the increase in litigation have resulted in its extension — by statutory channels — even to decisions which have not adjudicated the controversies on its merits.* (Emphasis in original)." *Rodríguez v. Baldrich,* 508 F. Supp. 614, 616 (D.P.R. 1981).[9]

The court quoted another passage from *Pérez v. Bauzá, supra,* which is relevant to the issue in this case, namely: a willful failure to comply with a discovery order must be accorded full *res judicata* effect in this court. The Supreme

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[7] *Rodríguez v. Baldrich,* 628 F.2d 691 (1st Cir. 1980) (judgment of dismissal on *res judicata* grounds vacated and remanded to district court for clarification of Puerto Rican law on *res judicata* effect in federal court of a state court dismissal for failure to post a nonresident cost bond).

[8] Pérez v. Bauzá, 83 P.R.R. 213, 217-218 (1961).

[9] According to *Pérez v. Bauzá, supra,* as interpreted by *Baldrich, res judicata* in Puerto Rico has the same contours that it has in federal law for it "relieve/s/ parties of the cost and vexation of multiple lawsuits, conserves judicial resources, and, by preventing inconsistent decisions, encourages reliance on adjudication". *Allen v. McCurry,* 449 U.S. 90, 94 (1980).

Court of Puerto Rico fully endorses the view that an involuntary dismissal under Rule 39.2 of the Rules of Civil Procedure of Puerto Rico of 1958[10] (equivalent to Fed. R. Civ. Proc. 41(b)), operates as an adjudication on the merits:

> "/*T*/he pertinent part of the rule reads as follows:
>
> '(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to presecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence, in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, operates as an adjudication upon the merits.
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> * * *
>
> "Rule 41(b) is consistent with the inherent power of courts to relieve the congestion of their calendars . . ., and likewise *it is undoubtedly*

[10]As pointed out in *Baldrich, supra*, 508 F. Supp. at 615, n. 1, the Puerto Rico Rules of Civil Procedure of 1958 were repealed in 1979 by the Rules of Civil Procedure of 1970. Rule 39.2 was reenacted as Rule 39.2(a) and its text, insofar as pertinent here, is identical to that of its predecessor. See, 32 L.P.R.A. App. 111, p. 162 (1980). This rule is virtually identical to Fed. R. Civ. Proc. 41(b) governing involuntary dismissals. In 1943 it was also known as Rule 41(b) of the Rules of Civil Procedure of Puerto Rico, 1943, and such is the reference in the *Bauzá* passage reproduced above.

> *consistent with the laudable purpose of discouraging delinquent litigants or those who utilize the judicial channel to cause inconveniences to the adverse party by initiating untenable proceedings.'* "
> Emphasis in original quotation of Rule 41(b) other emphasis, ours). *Id.*

Clearly a Puerto Rican court would accord full *res judicata* effect, as a matter of statutory law, to a dismissal of claims filed by a recalcitrant party who willfully disregards discovery orders issued by the court, much the same way as a federal court would do in similar circumstances.[11] *Compare, Nasser v. Isthmian Lines,* 331 F.2d 124 (2d Cir. 1964) (involuntary dismissal of seaman's complaint for failure to answer interrogatories operates as *res judicata* in subsequent federal suit) *with Souchet v. Cossió,* 83 P.R.R. 730 (1961) (prior involuntary dismissal of action seeking declaration of nullity of a sale, replevin and other remedies for failure to prosecute, accorded full *res judicata* effect in subsequent identical action between the same parties).

The pronouncements of the Supreme Court of Puerto Rico echoed in *Baldrich,* to the effect that public policy requires that procedural or "penalty dismissals"[12] be accorded full *res judicata* effect in subsequent litigation initiated

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[11] In dismissing complaints for failure to comply with discovery orders the trial courts of the Commonwealth of Puerto Rico seem to enjoy the same discretionary latitude as federal district courts. Orderly administration of justice in this sense is identical both in the state and federal systems. See, e.g., *Corchado v. Puerto Rico Marine Management,* 665 F.2d 410 (1st Cir. 1981) (circuit court underscores that dismissals with prejudice for failure to comply with discovery orders will ordinarily be upheld as being within sound discretion of trial court).

[12] See, generally, 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure,* Civil: Sec. 4440, at 362-365 (1981).

by the parties affected by such dismissals, is not inconsistent with recent pronouncements on the subject by the Supreme Court of the United States.

In *Allen v. McCurry*, 449 U.S. 90 (1980), the Court accorded full *res judicata* effect to state court determinations made in the course of criminal proceedings in the context of a subsequent federal civil rights action brought in federal court by the criminal defendant. The Court made it very clear that litigants have no "unencumbered opportunity to litigate a /federal/ right in federal district court, regardless of the legal posture in which the federal claim arises". 449 U.S. at 103. It is only necessary that a particular litigant have a "full and fair opportunity" to present the particular claim or issue in state court. *Id.* at 95.

The Court has recently stated that the contents of "what a full and fair opportunity to litigate entails is the procedural requirements of due process.", *Kremer v. Chemical Construction Corp., supra*, 102 S.Ct. at 1898, n. 24, and the fact that a particular litigant "fail/s/ to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy" /citations omitted/. *Id.* at 1899.

Considering the above, we have no doubt that the courts of the Commonwealth of Puerto Rico would give full preclusive or *res judicata* effects to a dismissal for willful failure to comply with discovery orders, such as was entered here by the state court on May 15, 1981. Notwithstanding, we must now determine whether we should give full preclusive effect to said judgment by virtue of the federal full-faith-and-credit statute, 28 U.S.C. Sec. 1738.

Plaintiffs strenuously argue that there is no identity of parties between this suit and the prior state court pro-

ceedings. They contend that even though Chase sued Nesglo, Néstor and Gloria in state court, only Néstor and "Nesglo did not file an answer and was not a counterclaimant". We disagree.

An examination of the answer and affirmative defenses filed in the state court on March 26, 1979 reveals that they were filed on behalf of "defendant" (la parte demandada).[13] Furthermore, in the portion of the counterclaim (reconvención) the appearing defendants are singled out and identified as "defendant-counterclaimant Mr. Néstor Cruz and Mrs. Gloria D. de Cruz" (la parte demandada-reconveniente don Néstor Cruz y doña Gloria D. de Cruz). But aside from party identification in connection with the pleadings, there are other indicia that Nesglo, in fact, appeared and made allegations in the state court. In the answer, practically all of the allegations refer to the business relationship between Chase and Nesglo. The same is true as to the affirmative defenses.

With respect to the counterclaim, while it may be true that it is filed by Néstor and Gloria, it still incorporates the affirmative defenses previously set forth by Nesglo, and sets forth claims for relief properly belonging to Nesglo and not just Néstor and Gloria as joint and several guarantors of the latter. Indeed, a comparison between the counterclaim and the amended complaint filed before this court reveals a substantial similarity, if not identity of, material operative facts underlying the various claims for relief stated in both documents.

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[13] In Puerto Rico it is common practice to refer to all defendants or the defendants in general as "the party defendant" (literal translation). If a particular defendant or plaintiff is to be singled out then he or she or it (if a corporation) is expressly identified in the pleadings.

Physical identity of parties is not necessary for *res judicata* purposes under Puerto Rican substantive law. As Article 1204 of the Civil Code provides, *in fine:*

> "It is understood that there is identity of persons whenever the litigants of the second suit are legal representatives of those who litigated in the preceding suit, *or when they are jointly bound with them or by the relationships established by the indivisibility of prestations among those having a right to demand them, or the obligation to satisfy the same.*"
> 31 L.P.R.A. Sec. 3343 (Emphasis supplied).

The state court record reveals that Néstor and Gloria were the joint and several[14] guarantors of Nesglo's contractual obligations to Chase. As such, their prestations were indivisible with those of Nesglo towards Chase and hence they had "a right to demand them, or the obligation to satisfy the same".[15] Indeed, a close examination of Néstor's and Gloria's counterclaim in state court, and their opposition to Chase's motion to dismiss the same, reveals that Néstor and Gloria are the functional privies of Nesglo

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[14]As explained by this court in *Wong v. Key Finance Corporation, 266 F. Supp. 149, 153, 154 (D.P.R. 1967), the words "joint" or "jointly" in english are the equivalent of "solidaria' or "solidariamente" in Spanish, which in the case of multiple debtors or guarantors, means that any* of them are liable for the entire sums owed. The Code also confers standing on solitary debtors to "utilize, against the claim of the creditor, all the exceptions arising from the nature of the obligation and those which are personal to him". Article 1101, 31 L.P.R.A. Sec. 3112. Sureties binding themselves jointly (solidarily) with the principal debtor are treated, according to the Code, as principal solidary debtors subject to the provisions found in Article 1090-1101, 31 L.P.R.A. Secs. 3101-3112. *Wong, supra, Id.*

[15]They also had the right to utilize against the claim of Chase, as creditor, all exceptions arising from the nature of the obligation. Article 1101.

within the scope and intendment of the "identity" definition found in the last paragraph of Article 1204.

The contents of the aforementioned opposition to Chase's motion to dismiss establish that Néstor and Gloria asserted standing on their own behalf and that of Nesglo, to prosecute their federal and state claims against Chase, including those arising out of the Tie-in Amendments, relying on their status as joint and several guarantors of Nesglo, entitled to oppose of interpose against the creditor */Chase/* the same defenses and/or causes of action that Nesglo would have opposed or interposed. Néstor and Gloria are therefore bound by the Judgment of May 15, 1981 as privies of Nesglo, for purposes of the identity required under Puerto Rican *res judicata* doctrine.[16]

Moreover, Nesglo has expressly admitted on the record that it was a party to the state court answer and counterclaim of March 26, 1979.

Plaintiffs' reliance on *A & P General Contractors v. Asociación Cana, Inc.*, 110 D.P.R. 753 (1981), is misplaced. In *A & P*, a guarantor sued to recover a pledge it had given to the creditor of the principal debtor. When such action was initiated, the principal debtor had already commenced suit against the creditor because of the latter's breach of its contractual obligations to advance money to the former for construction purposes. In the guarantor's

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[16]The same result would be obtained under the federal *res judicata* principle as the Supreme Court of the United States indicated in a similar context in *Montana v. United States, 440 U.S. 147 (1979). The Court at page 154 quoting from Souffront v. Compagnie des Sucreries*, 217 U.S 475, 486-487, observed that "/O/ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own . . . is as much bound . . . as he would be if he had ben a party to the record."

suit, as a condition for release of the pledge – a certificate of deposit – the court had to determine whether the creditor had indeed breached the contractual obligations to the principal debtor for then, said breach would not only extinguish the principal debtor's obligations to the creditor, but would also terminate the accessory surety agreement binding the guarantor-pledgor. Upon extinguishment of the prime obligation, the guarantor would thus become automatically entitled to return of the certificate of deposit pledged to the creditor, and this is exactly what happened in the guarantor's suit.

The state supreme court reversed the lower court ruling that had allowed the principal debtor in his separate suit against the creditor, to invoke successfully the doctrine of "offensive collateral estoppel" by judgment on the issue of the creditor's liability for breach of contract. The court advanced two grounds for its decision: (1) that the principal debtor being represented by the same attorneys as the guarantor, could have intervened but had voluntarily chosen not to do so in the guarantor's suit, and (2) that there was really no identity of parties between the principal debtor and guarantor since the latter was merely suing *qua* guarantor to recover the pledge. *A & P General Contractors, supra.*

As commentator Manresa points out, in discussing the requirement of "identity" of parties for the presumption of *res judicata* to be successfully invoked:

> "With reference to solidarity and indivisibility of obligations, we will note that the extension of the first judgment to all those interested therein shall have full application concerning the totality of the obligation, to its essence or validity, and to the acts wherein its origin is found; but not concerning the very personal circumstances of some-

> one who may not have litigated before, except in the event that they /such circumstances/ may have been utilized with respect to the exclusive portion of said interested person by one of his co-obligees.
>
> "It is to be noted, and it has great importance, that the requirement of identity of parties is in practice satisfied when the two suits are in all other respects *exactly* the same, and, presenting the same question, and exercising the same actions, [*t*hey are] ground[*ed*] on the same cause and refer[*red*] to the same objects."
>
> (Emphasis supplied) (Translation ours).

Manresa, *Comentarios al Código Civil,* Tome 8 Vol. II, pp. 242-243 (Reus, 5th Ed. 1950).

Scaevola takes the same position on this "identity" issue and concludes that, when two or more persons bound solidarily appear as such in a first suit, their personalities merge or they establish such a procedural unity, that what is done by one or against one binds all the rest, for purposes of *res judicata.* Scaevola, *Código Civil,* Tome XX, p. 450 (Madrid 1904). See also, Puig Brutau, *Fundamentos de Derecho Civil,* Tome I, Vol. 2 p. 146, n. 41 (Bosch. 1959). The Supreme Court of Puerto Rico has adopted these doctrinal views. *Heirs of Zayas Berriós,* 90 P.R.R. 537, 551-552 (1964). (Control of first action by real party defendants, sufficient to bar second suit by said defendants due to their juridical solidarity with nominal party defendant appearing in first suit); Cf. *General Foods v. Mass. Dept. of Public Health, infra,* 648 F.2d at 787-789 and note 6; *Pan American Match, Inc. v. Sears Roebuck Co.,* 454 F.2d 871, 874 (1st Cir.), cert. den. 409 U.S. 892 (1972).

Plaintiffs next contend that the state court proceedings did not involve the same claims as those pressed before this court. They collaterally attack the state court's jurisdiction over the federal Tie-in Amendment violations they voluntarily raised there as affirmative defenses and counterclaim.[17] Their argument is premised on the theory that Congress vested federal courts with exclusive jurisdiction to entertain this type of claim to the exclusion of state courts. With respect to their federal constitutional and civil rights claims, they contend that Judge Dalton, sitting by designation, somehow reserved plaintiffs' rights to come back to this court.

Upon examining the state court claims pressed by plaintiffs-defendants-counterclaimants therein — and comparing them to the amended complaint filed before this court[18] in September 1978, we find that all of the causes of action pleaded in the state court have their roots in the same nucleus of operative facts comprising the business contractual relationship between Chase and Nesglo dating back to 1972. It may be that particular theories, bolstered by statutory citations, vary somewhat,

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[17]Plaintiffs themselves characterize Néstor's and Gloria's state court counterclaim as permissive. Though it is not necessary for us to decide whether such counterclaim is permissive or compulsory for purposes of this opinion, certainly this characterization shows that plaintiffs were not involuntary defendants hauled into state court against their wishes. They freely chose their state forum and must abide their conduct even if it implies waiver of a federal forum and its protections. See, *Nash County Board of Education v. Biltmore Co.*, 640 F.2d 484, 492 (4th Cir. 1981), cert. den. 454 U.S. reh. den. 454 U.S. 1117.

[18]A complete description of the claims set forth in this amended complaint of September 1978 is set out in our original reported opinion and order dismissing this action. See, 506 F. Supp. 254 (D.P.R. 1981).

but the essential facts giving rise to the claims asserted are a constant factor in both the state and federal pleadings.

In requesting the state court to issue summons to serve Zych and Fernández as third party defendants, plaintiffs in May 1980 made reference to the federal action and its similarities to the state court proceedings. Later, they even attached an order of this court as part of their opposition to Chase's request for dismissal of Nesglo's counterclaim filed in state court.

In their motion for reconsideration of the judgment entered by the state court on May 15, 1981, and apparently aware of the *res judicata* effect that said judgment would have in the federal proceedings, plaintiffs Nesglo, Néstor and Gloria advanced as a ground in support of their request, the concurrent "complaint in the United States District Court for the District of Puerto Rico, *in which the same parties and basically the same facts are involved*" (emphasis added) as well as the appeal pending before the United States Court of Appeals for the First Circuit. They attached as exhibits copies of the brief filed before the First Circuit Court of Appeals.

In Puerto Rico, strict identity between causes of action in the first and second suits is not required. The cause or grounds for the claim or request should not be confused with the remedies actually sought in one or the other action. *Mercado Riera v. Mercado Riera*, 100 P.R.R. 939, 950-51 (1972).

In *Mercado Riera*, *res judicata* was applied by the court to a new action for damages arising out of the dissolution of a partnership because in the previous action plaintiff had failed to claim them. The court expressly overruled

two prior cases[19] which had rejected the defense of *res judicata* "because, desite the fact that the second action could be joined to the first, the failure to join it did not constitute a waiver of the claim for damages because the right to join several causes of action is discretionary with the plaintiff" /citations omitted/. *Id.* at 953. The trend in Puerto Rico, therefore, is to preclude in the subsequent suit whatever could have been claimed or joined with the first one but was not. This, of course, includes all grounds or defenses that could have been raised either prior to or after judgment in the first suit. And, ordinarily, failure to correct an error in the first action either by motion or on appeal will result in preclusion in the subsequent action, even if the first judgment can be branded as erroneous. Cf. A.S.A. v. Beléndez, 98 P.R.R. 506, 510-512 (1970) (failure to appeal first ruling that plaintiff had not exhausted his administrative remedies precludes him from raising lack of jurisdiction of an administrative board in second suit even if jurisdictional theory had changed between suits).

Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955), advanced by plaintiffs in support of their theory that the state and federal claims are not the same, is distinguishable from the case at bar for there a state court judgment[20] was not involved and under federal principles of *res judicata* new operative facts giving rise to new claims for relief had arisen, as well as new parties joined when the second suit was filed.

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[19] *Blanco v. The Capital*, 77 P.R.R. 607 (1954) and *Capo v. A. Hartman & Co.*, 57 P.R.R. 190 (1940).

[20] As *General Foods v. Mass. Dept. of Public Health, supra*, 648 F.2d at 785-786 makes clear, in the case of a state court judgment deciding federal questions, federal courts must refer to state law on *res judicata* to comply with the command of 28 U.S.C. Sec. 1738.

In light of the foregoing legal principles, and on the basis of the state court record, we conclude that there is "identity" of claims for *res judicata* purposes between the claims advanced by plaintiffs in this court and those previously advanced in the state court.

Interestingly, plaintiffs seem to attack the state court's jurisdiction over the claims they voluntarily presented there and which were the subject of extensive discovery, contending that the state court lacked subject matter jurisdiction because Congress granted exclusive jurisdiction to federal courts to entertain private treble damage suits based on violations of the Tie-in Amendments prohibitions found in the federal banking laws.

As we pointed out in our original decision in this case, it was not the intention of Congress to preempt state court jurisdiction over activities otherwise covered by the federal banking tie-in amendments. If so, there would not have been any reason for Congress to have inserted the language in 12 U.S.C. Sec. 1978[21] acknowledging the parallel power of the states to afford relief to any citizen suffering business injury as a consequence of the conduct prohibited by the preceding sections of the act. This congresional concern for preserving intact concurrent state

[21] 12 U.S.C. Sec. 1978 provides as follows:

> "Nothing contained in this chapter shall be construed as affecting in any manner the right of the United States or any other party to bring an action under any other law of the United States or of any State, including any right which may exist in addition to specific statutory authority, challenging the legality of any act or practice which may be proscribed by this chapter. No regulation or order issued by the Board under this chapter shall in any manner constitute a defense to such action."

jurisdiction over banking, is reflected in the abridgment of the original prohibition of anticompetitive practices envisioned in the original Senate Bill, so as not to interfere with traditional, localized banking customs and customer credit extension pratices. *Nesglo, Inc. v. Chase Manhattan Bank, N.A., supra,* 506 F. Supp. at 261-264.

Indeed, the plain statutory language of 12 U.S.C. Secs. 1975[22] and 1978, is fully compatible with, and does not implicitly repeal or carve an exception to, the full-faith-and-credit mandate found in 28 U.S.C. Sec. 1738. In *Kremer v. Chemical Construction Corporation, supra,* the Supreme Court of the United States refused to construe the statutory grant of a right to federal court access granted to victims of employment discrimination under Title VII of the Civil Rights Act of 1964, as implicitly repealing the mandate of 28 U.S.C. Sec. 1738. Likewise, the defenrence to state court jurisdiction over banking affairs embodied in 12 U.S.C. Sec. 1978, as supported by the legislative history of the bank Tie-in Amendments, should disprove such implied repeal of or exception to a time-tested federal statute of such practical significance for present-day comity and federalism.

Plaintiffs brought upon themselves the natural consequences of their own voluntary acts before the state court. So much is apparent from the state court Opinion and

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[22]28 U.S.C. Sec. 1975 provides as follows:

> "Any person who is injured in his business or property by reason of anything forbidden in section 1972 of this title may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without regard to the amount in controversy, and shall be entitled to recover three times the amount of the damages sustained by him, and the cost of suit, including a reasonable attorney's fee."

Judgment of May 15, 1981. In this sense, the state court judgment is, in principle, no different from the state court judgment by stipulation entered and given full *res judicata* effect by a federal court in *Nash County Board of Education v. Biltmore Co.*, 640 F.2d 484 (4th Cir. 1981), cert. den. 454 U.S. 878, reh. den. 454 U.S. 1117.

In *Nash* a state county board of education sued in federal district court various milk producers seeking treble damages for a price fixing conspiracy in violation of the federal antitrust laws. However, the State Attorney General had previously entered into a consent decree with the milk producers in a prior state action he had brought under the state antitrust laws. The federal district court gave full *res judicata* effect to the state court judgment and dismissed the action. The U.S. Court of Appeals for the Fourth Circuit affirmed, holding that 28 U.S.C. Sec. 1738 barred the second suit. The court used various alternative theories to support its conclusion that the state court judgment was entitled to full-faith-and-credit in the federal court even though the antirtust laws had been judicially construed to confer exclusive federal jurisdiction on federal courts. In comparing the state and federal claims, if focused on the operative facts giving rise to both claims rather than on the statutory source for each, and attached significant consequences to the conduct of plaintiffs' representative in prosecuting the claims in state court:

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[23]In so doing, the court adopted Moore's comments on *Connelly v. Balkwill*, 174 F. Supp. 60 (N.D. Ohio 1959), aff'd. 279 F.2d 685 (6th Cir. 960). *Nash, supra*, 640, F.2d at 488, no. 10. The Supreme Court of the United States has noted the *Nash* method of ascertaining whether there is identity of claims in *Kremer v. Chemical Construction Corp., supra.*

> ". . . the plaintiff, *by choosing to file the state action on the same cause of action, had voluntarily waived the benefits if any, of a federal forum and both res judicata and collateral estoppel should be available to bar a cause of action,* even though the federal action was within the exclusive jurisdiction of a federal court."
> (Emphasis supplied)
> *Nash, supra,* 640 F.2d at 497.

As the Supreme Court stated in *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394 (1981), a party who has litigated in a prior action will be held to his conduct therein, and if he fails to pursue a remedy within the prior action that could have preserved his rights, he may not thereafter seek collateral relief in the federal courts. The virtues of *res judicata* were further stressed in *Moitie* as an important tool for the even handed administration of justice within the federal system. Petitioners – retail purchasers of clothing – Moitie and Brown – had initially filed an antitrust suit in a California federal district court alleging a price fixing conspiracy among retail chain stores in California. The action was dismissed because, at that time, ultimate consumers or purchasers of products were considered not to have standing to sue under federal antitrust laws. They did not appeal to the decision of the district court whereas other plaintiffs *did* appeal. While the latter appeal was pending, the Supreme Court issued an opinion recognizing retail purchasers standing to sue under federal antitrust law,[24] and the appeals court reversed and remanded. Meanwhile, Moitie and Brown had refiled their antitrust laws. Defendants removed the same

[24] *Reiter v. Sonotone Corp.,* 442 U.S. 330 (1979) held that retail purchasers can suffer an "injury" to their business or property within the meaning of section 4 of the Clayton Act, which grants a private treble damage remedy to persons suffering business injury as a consequence of an antitrust violation.

to the federal district court that had previously entertained the action and now had it on remand from the court of appeals, which had vacated the dismissal in light of the intervening Supreme Court decision on standing. Defendants then moved for dismissal and the court granted it considering its prior decision to be *res judicata* as to Moitie and Brown. An Appeal was taken, and the court of appeals reversed because it considered the district court's initial decision to be erroneous, and hence, unjust for Moitie and Brown to suffer the consequences of a dismissal while those in their same procedural posture were allowed to prosecute identical claims. Defendants finally appealed to the Supreme Court and the latter reversed the court of appeals.

The Supreme Court underscored the conduct of Moitie and Brown in the first action and the fact that they *failed to appeal* the initial district court decision, even though the same was later reversed as being erroneous. Whether the decision was correct or not was considered by the court to be immaterial for *res judicata* purposes,[25] because Moitie

[25]Defendants read the *Moitie* decision as signaling the demise of the judicially created doctrine of exclusive federal judicial jurisdiction in antitrust cases. See *Nash, supra*, 640 F.2d 492, n. 13. They argue that inasmuch as the Supreme Court acted on an action removed from state court, if the pleadings, as the court stated, merely reproduced the initial federal antitrust claims originally filed in the district court, then the state court had no subject matter jurisdiction over the action and the district court could acquire none on removal. *General Investment Co. v. Lake Shore & M.S.R. Co.*, 260 U.S. 261, 288 (1922) (federal court must dismiss for want of jurisdiction federal antitrust action originally filed in state court and subsequently removed to the former court). See also, *Blumenstock Bros. Adv. Agency v. Curtis Pub. Co., 252 U.S. 436 (1920); Freeman v. Machine Co.*, 319 U.S. 448, 451, n. 6 (1943); *but see*, Testa v. Katt, 330 U.S. 386, 389-394 (1947) (state court is obligated under supremacy clause, to enforce private treble damage remedy – similar to that in antitrust laws – found in Emergency Price Contol Act of 1942, as amended, regardless whether it be con-

and Brown had foregone an initial appeal when their original federal action had been dismissed. They had available an appellate procedure, which they should have

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sidered "penal" in nature). A remand was thus in order and the *res judicata* question need not have been decided. A careful review of the *Moitie* Supreme Court decision reveals that indeed the court was aware of the removal problem, but nevertheless chose to entertain the *res judicata* arguments. *Moitie, supra*, 452 U.S. at 397, n. 2.

While defendants' arguments certainly bear weight; we find it unnecessary to reach this issue on the present record. Whether or not the state court here had subject matter jurisdiction of the federal claims before this court, is really immaterial in view of the opportunities available to the plaintiffs to redress any jurisdictional errors within the state court system.

We remain unpersuaded that Congress intended to vest federal courts with jurisdiction exclusive of that of state courts to entertain private treble damage actions under the Tie-in Amendments, especially, under the criteria set forth in *Gulf Offshore Co. v. Mobil Oil Corp.*, 449 U.S. 1033, to determine whether a congressional grant of federal jurisdiction displaces state court jurisdiction over the same federal claims:

1) an explicit statutory directive;
2) an unmistaken implication from legislative history, and
3) a clear incompatibility between state court jurisdiction and federal interests.

Aside from the fact that in the case of Tie-in Amendments, there is no explicit statutory directive or legislative history permitting an inference of exclusive jurisdiction – the contrary is just the situation as embodied in 12 U.S.C. Sec. 1978 – we fail to perceive a clear incompatibility between state court jurisdiction and the commercial interests sought to be protected by Congress in the amendments. The broad traditional regulatory power of banking by the states, taken into consideration by Congress in enacting the Tie-in Amendments, certainly makes entertainment of such federal claims by state courts conducive to the enforcement of federal rights. *Kremer v. Chemical Construction Corp.*, supra, Dowd Box Co., v. Courtney, 368 U.S. 502, 507-508 (1962) (concurrent jurisdiction of state courts upheld in actions under Section 301 of the Labor Management Relations Act). Certainly, the

used regardless of the settled antitrust doctrine prevalent at that time (prior to the *Sonotone* decision).

The reasoning in *Moitie* is fully applicable here. Plaintiffs Nesglo, Néstor and Gloria had a full and fair opportunity to present their case in state court, including any objections they may have had to the subject matter jurisdiction of the state court. They voluntarily chose not to avail themselves of that opportunity and they seek further prosecution of their claims in this court under the theory, rejected in *Allen v. McCurry, supra,*[26] that "every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the claim arises". 449 U.S. at 103.

Let us now examine plaintiffs' assertion that they preserved their federal rights in this court pursuant to Judge Dalton's Order of April 22, 1981. Plaintiffs' reliance on *England v. Luisiana State Bd. of Med. Exam,* 375 U.S. 411 (1964) is again misplaced. Contrary to the *England* situation, where plaintiffs first sought relief in federal court (375 U.S. at 412), plaintiffs herein and their privies first pressed their federal claims in state court and then

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courts of the Commonwealth of Puerto Rico are not foreign to broad antitrust private treble damage remedies to redress unfair methods of competition of the type pressed by plaintiffs in this court. See, the Puerto Rico Monopoly Act, Act No. 77 of June 25, 1964, as amended, 10 L.P.R.A. Secs. 257 et seq., especially Secs. 259(a) and 262) (Unfair Methods of Competition and Exclusive Dealing). The act explicitly vests on the Superior Court of Puerto Rico jurisdiction to entertain private treble damage suits in 10 L.P.R.A. Sec. 268(a).

[26]The U.S. Court of Appeals for the First Circuit had already held *pro tanto* in the context of a state civil proceedings in *Lovely v. Laliberte,* 498 F.2d 1261, 1263-64 (1st Cir. 1974), cert. den. 419 U.S. 1038 (1974).

refiled them in federal court. See, *Partido Nuevo Progresista v. Barreto Pérez,* 639 F.2d 825, 826, n. 2 (1st Cir. 1980), cert. den. 451 U.S. 895 and cases cited. In these circumstances, plaintiffs would seem foreclosed from invoking the doctrine of federal right preservation announced in *England.*

Moreover, while it is true that *England* reversed the lower court dismissal, it did so because it considered appellants to have relied in good faith on prior case law. Hence, it made the requirement of explicit reservation of federal rights in state court prospective in nature, explicitly warning that the mistaken view of the appellants in that case "will not avail other litigants who rely upon it after today's decision". (375 U.S. at 422) Plaintiffs here are therefore not entitled to the relief afforded the *England* plaintiffs, for they actively prosecuted their claims in state court, and voluntarily invoked, as well as used, the state court process, fully and unreservedly submitting to it. Now they are and should be bound by the judgment entered by said court. The fact that the claims pressed in state court were never actually litigated is immaterial for, by operation of law, the state court dismissal here is the equivalent of a trial on the merits,[27] the same way it would have been in this court under Fed. R. Civ. Proc. 41(b). Consequently, all of the federal claims,[28] even those allegedly arising under the Tie-in Amendment, were properly dismissed by the state court. See, *Key v. Wise,* 629 F.2d 1049 (5th Cir. 1980), cert. den. 454 U.S. 1103 (federal

[27]See *Rodríguez v. Bladrich, supra.*

[28]There is no question that state court jurisdiction over the federal constitutional and civil rights claim is concurrent with that of federal courts. See *Díaz v. Collazo,* 82 JTS 30 (March 10, 1982) and cases cited; see, also, *Lovely v. Laliberte, supra,* note 126.

claim over which federal courts had exclusive jurisdiction by explicit congressional grant held barred by state court judgment entered after federal court erroneously abstained from entertaining federal claims originally brought to its attention).

Even if the assumption of jurisdiction by the state court over these claims were erroneous, and we remain unpersuaded that this is so,[29] we are not at liberty to collaterally review such an implicit exercise of jurisdiction. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) (subject matter jurisdiction underlying bill in equity to collaterally review state court judgment because of federal prohibitions, held impermissible); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940) (erroneous assertion of jurisdiction by first court not collaterally reviewable); *Erspan v. Badgett*, 659 F.2d 26, 28-29 (5th Cir. 1981), cert. den. 102 S.Ct. 1443 (no jurisdiction found, on the basis of *Motie*, to collaterally review a state court judgment of doubtful binding force after a U.S. Supreme Court decision); *Key v. Wise, supra*, 629 F.2d at 1055-1057, 1061-1068) (state court assumption of jurisdiction over federal claims within exclusive jurisdiction of federal court after erroneous abstention by federal district court, held to bar collateral review of state court judgment sought by plaintiffs upon return to federal court); Cf. *Kremer v. Chemical Construction Corporation, supra, Underwriters*

[29]Even if this were a case of exclusive federal judicial jurisdiction, the equities would tend to favor enforcement of traditional *res judicata preclusion* inasmuch as there is simply no need to assess whether uniform national policy in antitrust enforcement would be affected given the voluntary conduct of plaintiffs in state court in refusing to comply with state judicial procedure. If anything, an interest in uniform and proper administration of justice should prevail, and in this instance, the state court judgment fosters this interest the same way as any federal judgment in similar circumstances would.

National Assurance Company v. North Carolina Life & Accident & Health Insurance Guaranty Association, supra (state court collateral review of sister state court judgment is very narrow and otherwise subject to *res judicata* and full-faith-and-credit constraints).

In view of the above findings and conclusions, we hold that on the basis of the record before us,[30] the courts of Puerto Rico would give full preclusive effects to the state court Judgment of May 15, 1981. This being so, we find that 28 U.S.C. Sec 1738 commands this court to do likewise.

Inasmuch as the issues pending appellate review before the U.S. Court of Appeals for the First Circuit have been fully disposed of by the courts of Puerto Rico, we further consider this case to have been rendered moot for interim events or collateral judicial proceedings have fully disposed of the live case or controversy that at one time may have existed between opposing parties to the litigation. Based on the foregoing, our prior opinion and order entered December 2, 1980 and accompanying judgment, should be substituted[31] by the present opinion, and a judgment of dismissal on grounds of mootness should be

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[30]As mentioned previously, in arriving at our findings and conclusions, we have relied in part on our familiarity with Puerto Rican substantive and procedural law. In any event, as respects civil procedure, the Puerto Rican rules are very similar to and sometimes identical with the Federal Rules of Civil Procedure. This identity exists in the area of dismissals for failure to comply with discovery orders.

[31]Given the retention of appellate jurisdiction by the United States Court of Appeals for the First Circuit, we may not vacate our prior judgment at this stage of the proceedings. However, this should not be construed as a rejection or departure from the view expressed in our original opinion to which we still adhere.

entered. *United States v. Munsingwear, Inc., 340 U.S. 36, 39-41 (1950); Gomes v. Rhode Island Interscholastic League,* 604 F.2d 733, 736 (1st Cir. 1979); and *Duke Power Co. v. Greenwood,* 299 U.S. 259, 267 (1936) (when controversy becomes moot on appeal it is duty of appellate court to set aside decision below and remand cause with directions to dismiss).

The Clerk is ordered to remit forthwith the instant Findings of Fact, Conclusions of Law and Memorandum Opinion, as well as the supplementary record upon which they are based, to the Clerk of the United States Court of Appeals for the First Circuit.

SO ORDERED.San Juan, Puerto Rico, this 8th day of February, 1983.

/s/

GILBERTO GIERBOLINI
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

NESGLO, INC., et al Plaintiffs	*	
v.	*	CIVIL No. 79-1674 GG
THE CHASE MANHATTAN BANK, N.A. et al Defendants	*	

ORDER

In our title Findings of Fact, Conclusions of Law and Memorandum Opinion dated February 8, 1983, there are several clerical errors regarding dates that should be corrected forthwith.

1. a) Page 29, fourth line from the top – instead of 1978, it should read 1979.

b) Page 29, fourth line from the top – instead of 1978, it should read 1979.

c) Page 29, footnote 18 at the last line –& instead of 1981, it should read 1980.

2. page 40, third line from the top – instead of 1981, it should read 1980.

New pages number 29 and 40 showing the aforementioned corrections have been already inserted in the original.

SO ORDERED.

San Juan, Puerto Rico, this 14th day of February, 1983.

/s/

GILBERTO GIERBOLINI
U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 81-1097

NESGLO, INC., ET AL.,
Plaintiffs, Appellants,

vs.

THE CHASE MANHATTAN BANK, N.A.,
Defendants, Appellees.

MOTION FOR CLARIFICATION OF ORDER

To The Honorable Court:

NOW COME the appellants by and through its undersigned attorney and respectfully allege and pray as follows:

1. That a Court's order entered February 22, 1983 has been notified to the herein appellants and it is stated that this case is to stand submitted.

2. That on February 8, 1983 the District Court below entered "Finding of Facts, Conclusions of Law and Memorandum Opinion" in which there was decided matters outside the scope of the jurisdictional grant established by this Honorable Court's order of September 11, 1981 on the topic of mootness. The District Court below also made new and additional determinations of facts without there having been evidence or witnesses presented. Under those circumstances a notice of appeal was filed

below by appellants on February 23, 1983. The herein appellants followed the applicable Rule 4 (a-4) of Appellate Procedure which requires that an additional and new notice of appeal must be filed when the trial court makes additional findings of facts and although no additional fees are required to be filed, the herein appellant also filed such fees.

3. That the herein appellants followed the above procedure as a matter of right and as a further precaution so that opposing parties could not request dismissal of the appeal for failure to follow Appellate Rule 4 (a-4) and because of the procedure errors below. They have requested a transcript of the hearing held below in contemplation of the Brief they are now preparing to be filed.

4. That appellees have now filed a motion to dismiss the February 1983 appeal, but, due to what the herein appellants have stated, that is not a proper motion, inasmuch as filing of the February 22, 1983 notice of appeal was not a frivolous act but is fully supported by the Rules of Appellate Procedure and a right of the appellants to be heard on what took place in the Court below.

WHEREFORE, the herein appellants very respectfully request a clarification on the appeals as they now stand.

Respectfully submitted at San Juan, Puerto Rico, this 2nd day of March, 1983.

/s/
EDELMIRO SALAS GARCIA
Penthouse Esquire Bldg.
P. de León Cor. Vela St.
Hato Rev, P. R. (00918)
Tel. (809) 765-3055

I CERTIFY: That on this same date I have sent a true and exact copy of the foregoing motion to Jay A. García Gregory, Esq., Fiddler González & Rodríguez, GPO Box 3507, San Juan, Puerto Rico (00936).

At San Juan, Puerto Rico, this 2nd day of March, 1983.

/s/
EDELMIRO SALAS GARCIA

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 81-1097

NESGLO, INC., ET AL.,
Plaintiffs, Appellants,

v.

THE CHASE MANHATTAN BANK, N.A., ET AL.,
Defendants, Appellees.

Before COFFIN, *Chief Judge,*
CAMPBELL and BREYER, *Circuit Judges.*

MEMORANDUM AND ORDER

Entered March 4, 1983

Pursuant to our order of September 14, 1981, lwe have received from the District Court its opinion, supported by findings of fact and conclusions of law based on its consideration of documents relating to litigation in the courts of the Commonwealth, to the effect that, because 28 U.S.C. § 1738 commands a federal court to give the same full faith and credit to a state court judgment that it would be accorded in the state's own courts, and because the Commonwealth court judgment of May 15, 1981, would be given full preclusive effect by the Courts of Puerto Rico, this case has been rendered moot. Having reviewed the file and the Court's thorough and persuasive opinion, and deeming inappropriate any further delay, we agree with its conclusion.

We therefore vacate the judgment of the District Court and remand the cause to the District Court with directions to substitute its Findings of Fact, Conclusions of Law and Memorandum Opinion of February 8, 1983, for its Opinion and Order of December 2, 1980, and to enter a judgment of dismissal on the grounds of mootness.

No costs.

By the Court:

/s/ DANA H. GALLUP.
Clerk.

[cc: Mesrs. Salas Garcia & Garcia Gregory.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 81-1097
No. 83-1166

NESGLO, INC., ET AL.,
Plaintiffs, Appellants,

vs.

THE CHASE MANHATTAN BANK, N.A., et als.,
Defendants, Appellees.

MOTION FOR RECONSIDERATION

To The Honorable Court:

NOW COME the appellants by and through the undersigned attorney and respectfully allege, state and pray:

1. That on March 4, 1983, this Honorable Court entered a Memorandum and Order whereby the District Court judgment was vacated and the case was remanded to the District Court with directions to substitute its Findings of Fact, Conclusions of Law and Memorandum Opinion of February 8, 1983 for its Opinion and Order of December 2, 1980 and to enter a judgment of dismissal on the grounds of mootness.

2. That the herein appellants very respectfully request reconsideration to this Honorable Court of its March 4, 1983 Memorandum and Order for the following reasons:

a. The herein appellants were not afforded an opportunity to express on appeal their objections to the District

Court's erroneous new factual determinations. Under Appellate Rule 4 (a-4) the herein appellants feel that they had the right to file a notice of appeal and brief stating their factual and legal arguments. They feel that otherwise their procedural rights to appeal and to due process of law would be violated. Appellants thus feel that they are entitled to pursue appeal number 83-1166 which has been filed before this Honorable Court.

b. The herein appellants have strong and meritorious arguments to oppose the District Court's erroneous determinations on its February 8, 1983 Findings of Facts, Conclusions of Law and Memorandum Opinion. Among others, there are the following reasons to vacate the said District Court's February 8, 1983 "Memorandum Opinion".

(i) The District Court erroneously found that Nesglo, Inc. litigated its claims before the Superior Court of Puerto Rico. Nesglo, Inc. did not file a counterclaim at the Superior Court. It filed its claims only before the District Court long before any Superior Court judgment. That was the reason for the order of the Honorable Ted Dalton. The contrary would mean that appellants are now sanctioned in this Honorable Court for following and obeying an order of a Federal Judge. More important yet, Nesglo filed in the District Court below causes of actions under section 1975 of the Bank Holding Act, which causes of action lie only under the exclusive jurisdiction of a federal District Court. The cause of action created under 12 U.S.C. 1975 are identical to an antitrust action under 15 U.S.C. 15. For ready reference we now respectfully transcribe said similar statutes:

Section 1975 of 12 U.S.C.:

"Any person who is injured in his business or property by reason of anything forbidden in section 1972 of this title may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without regard to the amount in controversy, and shall be entitled to recover three times the amount of the damages sustained by him, and the cost of the suit, including a reasonable attorney's fees".

Section 15 of U.S.C. Likewise reads:

"Any person who shall injured in his business or property by reasons of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fees".

Section 15 of Title 15 U.S.C. grants a civil cause of action to a person for *treble damages* arising out of injuries suffered to his business or property by reason of anything forbidden in the *antitrust laws.* As pointed out above, the language of this section and the one considered here, 12 U.S.C. sec. 1975, is almost identical. While there is as yet no detailed authority over section 1975, there is a body of case law which fully discusses the issue of exclusive jurisdiction by federal courts of 15 U.S.C. sec. 15. See *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 75 S.Ct. 865 (1955); *Kurek v. Pleasure Driveway*, 583 F.2d 373 (1978), U.S. cert. den. in 99 S.Ct. 873, 439 U.S. 1090; *Marrese v. American Academy*, 496 F. Supp. 236, 238 (1980); *Hayes v. Solomon*, 597 F.2d 758 (1979); *Cream Top Creamery v. Dean Milk Company*, 383 F.2d 358

(1967). It can thus be argued that when Congress framed the language of 12 U.S.C. 1975 in the same language as that of section 15 of Title 15 U.S.C., it could not have intended but that the causes of action under it were to have the same exclusive jurisdictional scope as under the well settled one contained under 15 U.S.C. section 15.

Even if the District Court had followed the September 11, 1981 Order of this Honorable Court, the doctrine of *res judicata* could only apply to a case when a court with competent jurisdiction has adjudicated the merits of a cause of action. But the doctrine of *res judicata* cannot be applied when the court that entered the judgment in another suit lacked jurisdiction over the subject matter See: *Kurek v. Pleasure Driveway,* supra; *Hayes v. Solomon,* supra; *Coalition of Black Leadership v. Ciane,* 570 F.2d 12 (1st Cir. 1978) *Lubber v. Selective Service System,* 453 F.2d 645 (1st Cir. 1975); *Kansas City Southern Ry Co. v. Great Lakes Carbon,* 624 F.2d 822 (8th Cir. Civ. 1980); *United States v. State of Ohio,* 487 F.2d 936 (1973); *U.S. v. Pawnee,* 382 F.Supp. 54 (1974); *Reich v. City of Free Port,* 527 F.2d 666 (1975); *Kalb v. Fewerstein,* 308 U.S. 833, 60 S.Ct. 343 (1940); *American Guarantee Corp. v. U.S.,* 401 F.2d 1004 (Ct. Claims 1968).

Under Puerto Rico law the defense of lack of jurisdiction is a privileged one and is never waived by a party although it is never raised in that party's answer. See in that connection Rule 10.8 of the Rules of Civil Procedure of Puerto Rico. There is an extensive body of Puerto Rico case law which holds that when a court has entered a *judgment without having jurisdiction* over the subject matter that judgment is subjected to collateral attack at any time although the judgment may be final and otherwise non ap-

pealable. See *Pueblo v. López,* 67 P.R.R. 732 (1947); *Bolker v. Tribunal,*, 78 P.R.R. 29 (1955); *E.L.A. v. Tribunal,* 86 P.R.R. 656 (1962); *Iturriaga v. Fernández,* 78 P.R.R. 29 (1955); *Vidal v. Monagas,* 66 P.R.R. 588 (1948) aff. by *Monagas v. Vidal,* 170 F.2d 99 (1948). *Monagas,* id, was a case affirmed by this Honorable Court. In that case it was held that *res judicata* could only apply when the prior judgment is a valid one but not when it is a void judgment.

Néstor and Gloria Cruz erroneously included in the counterclaim that they filed in the Superior Court, causes of action under section 1975 of the Bank Holding Act, 12 U.S.C. 1975. Nesglo was not allowed to file an answer, counterclaim and third party complaint in the Superior Court pursuant to the order of the Honorable Judge Dalton. Thus, its exclusive federal claims could not have been and were not adjudged in the Superior Court of Puerto Rico.

Under the foregoing analysis it was a clear error made below by the District Court to conclude otherwise that appellant's causes of action under 12 U.S.C. 1975 were to be somehow precluded since *res judicata* does not apply when the Superior Court of Puerto Rico had no jurisdiction over the subject matter and where there federal causes of action were not allowed to be filed and remained in the exclusive jurisdiction of the federal court.

(ii) The District Court went beyond the jurisdictional grant of this Honorable Court in its September 11, 1981 Order which required to make findings on the topic of mootness. The District Court did not make findings on the topic of mootness. It requested that appellants argue upon the doctrine of *res judicata* which Chase Manhattan Bank was not even requesting. The herein appellants timely and

vehemently objected to such procedure by the trial court for lack of jurisdiction. Moreover the Federal District Court could not apply the doctrine of *res judicata* since the Superior Court judgment of Puerto Rico could not adjudicate federal claims under the Bank Holding Act which could only be pursued exclusively in a federal district court. It is felt that the only finding that the trial court could make on mootness was that appellees had ceased the same conduct which had caused the damages to appellants. No such finding was made and most important no evidence was presented below on such aspect. This Honorable Court was presented with the *res judicata* theory and the "Judgment" of the Supreme Court of Puerto Rico in the pending appeal and rejected same and went on to issue its September 11, 1981 order to have the trial court receive evidence on "mootness". Appellants feel that the doctrine of mootness could be applied only if appellants had not suffered damages. It is well settled doctrine that mootness does not apply when personal injuries or damages are claimed. But appellants suffered and claimed damages in the complaint that they had pending in the District Court and which remained there under the Honorable Judge Dalton.

(iii) Under objection, the herein appellants clearly argued and demonstrated at the trial court below that the parties and causes of actions at the Superior Court proceedings were different than the parties and causes of action before the district court. Among the principal errors, the district court concluded that Nesglo Inc., Néstor Cruz and Gloria Díaz de Cruz were the same persons under a common law doctrine of "privity" and thereafter crossed another bridge to then conclude that corporation Nesglo, Inc. was a party claimant at the Superior Court together with Néstor and Gloria Cruz. It is a well settled corporate

doctrine that the person who contracts with a corporation is estopped to later challenge the corporate veil to find liability or so called "privity" with its shareholders. See 14 L.P.R.A. 2205. The Chase Manhattan Bank contracted with Nesglo, Inc. and was dividing secretly with Nesglo, Inc. the hidden profits. It was thus estopped and could not challenge the corporate veil under the said common law doctrine of "privity".

(iv) No evidence was presented nor was there an evidenciary hearing in the trial court below to make additional and new fact findings.

3. There are thus a multitude of errors made by the District Court below in its memorandum and "new" fact findings which the herein appellants should be allowed to be heard on and discuss on appeal before this Honorable Court.

WHEREFORE, to this Honorable Court it is hereby requested: (1) reconsideration of its March 4, 1983 order; (2) to allow the herein appellants to exercise their right to be heard on appeal.

Respectfully submitted at San Juan, Puerto Rico, this day of March, 1983.

I CERTIFY: That on this same date I have sent a true and exact copy of the foregoing motion to Jay A. Garciá Gregory, Esq., Fiddler, González & Rodrıguez, GPO Box 3507, San Juan, Puerto, Rico (00936).

/s/
EDELMIRO SALAS GARCIA
Penthouse Esquire Bldg.
P. de León Cor. Vela St.
Hato Rey, P. R. (00918)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1166.

NESGLO, INC., ET AL.,
Plaintiffs, Appellants,

v.

THE CASE MANHATTAN BANK, N.A.,
ET AL.,
Defendants, Appellees.

BEFORE CAMPBELL, *Chief Judge,*
COFFIN AND BREYER, *Circuit Judges.*

ORDER OF COURT
Entered April 28, 1983

The district court's February 8, 1983 opinion entitled Findings of Fact, Conclusions of Law and Memorandum Opinion issued in compliance with our September 14, 1981 order is an integral part of the appeal and not a final decision of a district court appealable under 28 U.S.C. § 1291. Thus, appellees' motion to dismiss this appeal for lack of jurisdiction is granted and the appeal is dismissed.

By the Court:

Francis P. Scigliano
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 81-1097.

NESGLO, INC., ET AL.,
Plaintiffs, Appellants,

v.

THE CHASE MANHATTAN BANK, N.A.,
ET AL.,
Defendants, Appellees.

BEFORE CAMPBELL, *Chief Judge,*
COFFIN AND BREYER, *Circuit Judges.*

ORDER OF COURT
Entered April 28, 1983

Finding that appellants' motion for reconsideration of our order of March 4, 1983 was untimely, that it does not bring to our attention points of law which we overlooked or misaprehended and that the issues it raises are adequately answered in the district court's opinion, the request for reconsideration is hereby denied.

By the Court:

Francis P. Scigliano
Clerk.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

NESGLO, INC., et al.,
Plaintiffs

v.

The Chase Manhattan Bank, N.A. et al.,
Defendants

Civil No. 79-1674 (GG)

JUDGMENT

The Court having entered an Order through the Hon. Gilbert Gierbolini,

IT IS NOW ORDERED AND ADJUDGED that this case be dismissed on the grounds of mootness.

SO ORDERED.

San Juan, Puerto Rico, June 20, 1983.

/s/
RAMON A. ALFARO
Clerk of the Court

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